114-15

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1031.

JAMES M. BARLOW, APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE AND HARMEL PRATT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 9, 1884.

SUPREME COURT OF THE UNITED STATES.

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No. 1031.

JAMES M. BARLOW, APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE AND HARMEL PRATT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a

Supreme Court, Utah Territory.

JAMES M. BARLOW, Appellant,
vs.
ALEXANDER RAMSEY *et al.*, Respondents.

Transcript.

Bennett, Harkness & Kirkpatrick, att'ys for appellant.
Rosborough & Merritt, Arthur Brown, and Sheeks & Rawlins, counsel for appellant.
Dickson & Varian, and Hoge & Jonasson, att'ys for respondents.

Copy served Jan'y 9th, 1884.

DICKSON & VARIAN,
Att'ys for Resp'ts.

Filed January 9th, 1884.

E. T. SPRAGUE,
Clerk of Supreme Court.

1 *Complaint.*

Supreme Court, Territory of Utah.

JAMES M. BARLOW, Plaintiff,
vs.
ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. Carleton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt, Defendants. } Transcript.

The plaintiff above named complains of the defendants, and on information and belief alleges, that after the 22d day of March, 1882, and prior to the first day of July, 1882, under the provisions of section 9 of an act of the Congress of the United States, approved March 22d, 1882, and entitled "An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," the President of the United States, by and with the consent of the Senate of the United States, duly appointed the defendants, Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton, and J. R. Pettigrew, to perform the duties mentioned in
2 said section, to be performed by a board of five persons, and by virtue of said appointment, they became a board of five persons with the powers named in said section.

And, on information and belief, the plaintiff alleges that, after such appointment, and prior to the first day of August, 1882, the last named five defendants, duly qualified as such appointees, came to Utah and organized as a board, and entered upon the exercise of the powers and the discharge of the duties granted and imposed by said section 9 of said act of Congress. That after said organization, said five defendants were commonly called "commissioners," and are hereinafter referred to and called the "Board of Commissioners."

That said Board of Commissioners afterward ordered, directed and supervised a registration of the voters of the Territory of Utah, for the general election in said Territory, to be held on the seventh day

of November, 1882, for the election of a delegate for said Territory to the Forty-eighth Congress, and for such other elections as might be held prior to another registration of voters of said Territory; and on or about the tenth day of August, 1882, the said Board of Commissioners made and published rules providing for said registration, for the appointment of registration officers and judges of election, and the canvas and return of the votes; directed said registration to be made during the week commencing on the second Monday of September, 1882, and, among other rules, wilfully and maliciously made and published the following:

"Rule I.

"There shall be appointed one registration officer for each county, and one deputy registration officer for each precinct thereof.

"Rule II.

"Such registration officer shall, on the second Monday of September next, proceed by himself and his deputies in the manner following: The registration officer of each county shall procure
3 from the clerk of the county court the last preceding registry list on file in his office, and shall, by himself or his deputies, require of each person whose name is on said list, or who applies to have his name placed on said list, to take and subscribed the following oath or affirmation:

"TERRITORY OF UTAH, } *ss:*
County of ——— }

"I, ——— ———, being first duly sworn (or affirmed), depose and say: That I am over twenty-one years of age, and have resided in the Territory of Utah for six months, and in the precinct of ——— one month immediately preceding the date hereof, and (if a male) am a native born or naturalized (as the case may be) citizen of the United States, and a tax payer in this Territory, (or if a female) I am native born, or naturalized, or the wife, widow or daughter (as the case may be) of a native born or naturalized citizen of the United States, and I do further solemnly swear (or affirm), that I am not a bigamist nor a polygamist; that I am not a violator of the laws of the United States prohibiting bigamy or polygamy; that I do not live or cohabit with more than one woman in the marriage relation, nor does any relation exist between me and any woman which has been entered into or continued in violation of the said laws of the United States prohibiting bigamy or polygamy, (and if a woman) that I am not the wife of a polygamist, nor have I entered into any relation with any man in violation of the laws of the United States concerning polygamy or bigamy.

"Subscribed and sworn to before me, this ——— day of ——— 1882.

———,

"*Registration Officer,* ——— *Precinct.*

"And said registration officer, or his deputies, shall add to said lists the names of all qualified voters in such precinct whose names

are not on the list, upon their taking and subscribing to the
4 aforesaid oath, and the said registration officer shall strike from said lists the names of said persons who fail or refuse to take said oath, or have died or removed from the precinct, or are disqualified as voters under the act of Congress approved March 22d, A. D. 1882, entitled 'An Act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes:' *Provided*, That the action of any registration officer may be revised and reversed by this commission, upon a proper showing: *And provided, further*, That if the registration officer be unable to procure the registration list from the office of the clerk of the county, or if the same have been lost or destroyed, the said officer and his deputies shall make a new registry list in full of all legal voters of each precinct of the county, under the provisions of these rules."

That said Board of Commissioners also, by rules, provided for the appointment of and appointed three judges of election for each election precinct in said Territory.

And on information and belief, the plaintiff alleges that the defendant, E. D. Hoge, was appointed registration officer for the county of Salt Lake, in said Territory of Utah, and the defendant, Harmel Pratt, was appointed deputy registration officer for the second election precinct of the city of Salt Lake, in said county, and that each accepted the appointment, duly qualified, and respectively acted throughout the said registration as such registration and deputy registration officer.

And the plaintiff alleges, that on the second Monday of September, 1882, the defendant, Harmel Pratt, as deputy registration officer for said second precinct in the city and county of Salt Lake, aforesaid, acting under the direction of the other defendants, commenced registering the voters of said precinct and making a registration list of such voters, and continued daily therein until the evening of Saturday of the same week, when the registration was closed.

5 And the plaintiff alleges that he is a native citizen of the United States of America, and prior to the 22d day of March, 1882, was more than twenty-one years of age; that he has resided continuously in the Territory of Utah for more than thirty-two years, and resided continuously in the second precinct of Salt Lake City, in said Territory, for more than two years last past; that he has, for more than thirty-one years prior to the November election in 1882, lawfully exercised the rights and enjoyed the privileges of the election franchise in said Territory, and has, for more than twenty years last past, owned taxable property and been a tax payer in said Territory, and that his name was on the last registration list of the voters of said second precinct, made prior to the second Monday of September, 1882.

And the plaintiff alleges that he has not, on or since the first day of July, 1862, married or entered into any marriage contract or relation with any woman, or in anywise violated the act of Congress approved July 1, 1862, defining and providing for the punishment of bigamy in the Territories, and has not violated any of the provisions

of the act of Congress approved March 22d, 1882, entitled "An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes;" and that he has not, on or since the 22d day of March, 1882, cohabited with more than one woman, that he has never violated any act of Congress or of any State or Territory of the United States in reference to bigamy or polygamy, and has never been charged with or accused or convicted of bigamy or polygamy, or cohabiting with more than one woman, in any court or before any officer or tribunal.

And the plaintiff alleges that on the 13th day of September, 1882, he personally went before the defendant, Harmel Pratt, then acting as deputy registration officer in and for the second precinct in Salt Lake City, aforesaid, and signed and presented to said defendant, and offered to verify, and requested the said defendant to take and certify plaintiff's oath to the following affidavit, to wit:

6 TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

I, James M. Barlow, being first duly sworn, depose and say: I am over twenty-two years of age, and have continuously resided in the Territory of Utah for more than six months, to wit, for more than thirty-two years last past; I have resided in the second precinct of Salt Lake City more than six months next preceding the date hereof and now reside therein; I am a male native born citizen of the United States of America, and a property owner and tax payer in said Territory of Utah. I have, under the laws of the Territory of Utah, exercised the elective franchise in said Territory for more than thirty-one years last past, and my name is on the last registry list of voters of said precinct. I have not, on or since the first day of July, 1862, and while having one wife living, married or entered into any marriage relations with another or another woman; and I have not in anywise violated the law of Congress approved on the date last aforesaid, defining and providing for the punishment of bigamy in the Territories. I was not cohabiting with more than one woman or claiming more than one woman as a wife for more than a year previous to the 22d day of March, 1882. I have not, on or since the 22d day of March, 1882, having a wife living, married another, or entered into any marriage contract or relation with any other woman, or simultaneously, or on the same day, married more than one woman, or on or since the date last aforesaid married any woman; and I have not, on or since the 22d day of March 1882, cohabited with more than one woman, or in anywise violated the act of Congress entitled "An act to amend section 5352 of the Revised Statute of the United States, in reference to bigamy, and for other purposes," approved March 22d, 1882.

Subscribed, sworn before me, this thirteenth day of September, A. D. 1882.

JAMES M. BARLOW.

And at the same time the plaintiff requested the said defendant,
Harmel Pratt, to put plaintiff's name on the registry list of
7 voters of said precinct, and to register him as a voter there-

in. The said defendant, Harmel Pratt, acting under the directions of the other defendants, wilfully and maliciously refused to receive said affidavit or to swear plaintiff thereto, or to register him as a voter of said precinct, but on the contrary wilfully and maliciously struck plaintiff's name off the list of registered voters of said precinct, and left his name off the list of voters of said precinct, made at said registration.

That afterwards, before the close of said registration, and on the 14th day of September, 1882, the plaintiff presented a duplicate of said last-named affidavit to the defendant, E. D. Hoge, then acting as county registration officer for said county of Salt Lake, and informed him of the ruling and action as aforesaid of the defendant, Harmel Pratt, and requested the defendant, E. D. Hoge, to correct and reverse said ruling, and to instruct the defendant, Harmel Pratt, to swear plaintiff to said affidavit and register him as a voter, and the said defendant, E. D. Hoge, wilfully and maliciously refused to correct or change said ruling and action, and approved and affirmed the same.

That on the 16th day of September, 1882, the plaintiff presented to said Board of Commissioners a duplicate of said last-named affidavit, and informed them of the action and ruling of the defendants, Harmel Pratt and E. D. Hoge, and requested said board to reverse and correct said rulings and action, and to direct that plaintiff's oath to said affidavit be taken, and that he be registered as a voter of said precinct, and the said Board of Commissioners wilfully and maliciously refused to correct or change said rulings, and affirmed and approved the same, and said last-named ruling was made before the close of the registration in said precinct, and when there was still time for plaintiff to have registered before the close of the registration.

And, on information and belief, the plaintiff alleges that the defendants all knew that, unless the plaintiff's name appeared on the registration list then being made of the voters of said precinct, his vote would not be received at the election to be held No-
8 vember 7, 1882, or at any election until after another registration of voters.

That at the election held throughout the Territory of Utah, on the 7th of November, 1882, for the election of a delegate for the Territory of Utah for the Forty-eighth Congress, the plaintiff went before the judges of election in said second precinct of the city of Salt Lake, in the county of Salt Lake, at the place where the votes in said precinct were being taken, and offered to vote at said election, and tendered and offered to take the same affidavit, but the said judges refused to receive his vote, on the ground that he was not registered as a voter in said precinct.

And, on information and belief, the plaintiff alleges that the defendants, and each of them, intending to wrongfully deprive the plaintiff of the elective franchise in said Territory, wilfully and maliciously, by the acts and in the manner aforesaid, refused the plaintiff registration as a voter, at the said registration commenced

on the second Monday of September, 1882, and deprived the plaintiff of the right to vote at the election held in said Territory on the 7th day of November, 1882, and at all elections under said registration, whereby plaintiff has sustained damage to the amount of twelve hundred dollars.

Wherefore the plaintiff prays judgment against the defendants for the sum of twelve hundred dollars and costs of suit.

BENNETT, HARKNESS & KIRKPATRICK,
Plaintiff's Attorneys.
ROSBOROUGH & MERRITT,
ARTHUR BROWN,
SHEEKS & RAWLINS,
Of Counsel for Plaintiff.

(Duly verified.)
Filed June 30, 1883.

9 *Demurrer.*

(Title.)

The defendants in the above entitled action, each in his own behalf, demur to the complaint therein, on the following grounds, which appear on the face thereof—

1. Said complaint does not state facts sufficient to constitute a cause of action.

E. T. SPRAGUE,
Defendants' Att'y.

(Duly verified and filed.)

Order on Demurrer.

(Title.)

The arguments on the demurer of the defendants herein having been heard, it is now ordered and adjudged that the demurrer be, and the same is hereby, sustained, and that the defendants have judgment against the plaintiff unless he amend his complaint herein and pay the costs of the demurrer.

And the plaintiff, by counsel, in open court, having declined to amend, and elected to abide by his complaint, judgment in favor of the defendants, and against the plaintiff, is ordered.

Dated Dec. 10th, 1883.

By the court:

JOHN A. HUNTER, *Judge.*

At the same time the plaintiff, by his counsel, duly excepted to the ruling and decision of the court on said demurrer, and the exception is allowed.

JOHN A. HUNTER, *Judge.*

(Filed Dec. 10, 1883.)

10 *Judgment.*

(Title.)

In this action the defendants having demurred to the plaintiff's complaint herein, and said demurrer having been argued and sub-

mitted to the court at the September term, 1883, thereof, and the same having now been fully considered by the court, the court now sustains said demurrer, and plaintiff, by his attorneys, Messrs. Bennett, Harkness & Kirkpatrick and others, electing to stand upon the said complaint and declining to amend the same—

On motion of Dickson & Varian, of counsel for defendants, it is ordered, adjudged and decreed that the plaintiff take nothing by his said suit, and that the complaint therein be dismissed.

And it is further adjudged and decreed that said defendants recover of and from said plaintiff their costs on this behalf expended and taxed at $10.00.

Filed Dec. 10, 1883.

Notice of Appeal.

(Title.)

To the above-named defendants:

Please take notice that the plaintiff in this action appeals to the supreme court of Utah Territory from the judgment rendered in this action on the 10th day of December, 1883, in favor of the defendants and against the plaintiff, and from the whole of said judgment.

Dated December 14th, 1883.

BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Plaintiff.

(Endorsed:) Service of a copy admitted, Dec. 14, 1883.

DICKSON & VARIAN,
Defendants' Att'ys.

Filed Dec. 14, 1883.

11 *Undertaking.*

(Title.)

The above-named plaintiff having appealed to the supreme court of Utah Territory from the judgment herein rendered against him and in favor of the defendants on the 10th day of December, 1883: now, therefore, the undersigned, as sureties, do jointly and severally undertake and promise that the appellant will pay all damages and costs which may be awarded against him on the appeal.

Dated December 15th, 1883.

A. MILTON MUSSER. [SEAL.]
DAVID JAMES. [SEAL.]

TERRITORY OF UTAH, } ss:
Salt Lake County, }

A. Milton Musser and David James, being each duly sworn, doth each for himself depose and say: I am a resident of Salt Lake City, Utah; am one of the sureties named in the above undertaking, and I am worth the sum of four hundred dollars over and

above all my just debts and liabilities, exclusive of property exempt from execution.

A. MILTON MUSSER.
DAVID JAMES.

Subscribed and sworn to before me, December 15th, 1883.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court.

Filed Dec. 15th, 1883.

We certify the foregoing is a full, true, and correct transcript of the record in this action.
Dated Jan'y 9, 1884.
BENNETT, HARKNESS & KIRKPATRICK,
Att'ys for Appellant.
DICKSON & VARIAN,
Att'ys for Resp'ts.

12 FRIDAY, *February 1st*, A. D. 1884.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock a. m., pursuant to adjournment. Present and presiding, Hon. John A. Hunter, chief justice; present, also, Hon. P. H. Emerson, associate justice, and Hon. S. P. Twiss, associate justice; the clerk, marshal, and members of the bar. The court was duly opened.

* * * * * * * *

JAMES M. BARLOW, Appellant,
vs.
ALEX. RAMSEY *et al.*, Respondents. } From 3d Dist.

This cause coming on regularly for hearing, was, by counsel of the respective parties, submitted on briefs, and by the court taken under advisement.

13 WEDNESDAY, *June 25th*, A. D. 1884.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock a. m., pursuant to adjournment. Present and presiding, the Hon. John A. Hunter, chief justice; present, also, the Hon. Philip H. Emerson, associate justice, and the Hon. Stephen P. Twiss, associate justice; the clerk, marshal, and members of the bar. Court was duly opened.

* * * * * * * *

JAMES M. BARLOW, Appellant,
vs.
ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODfrey, A. B. Carlton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt, Respondents. } From 3d Dist.

This cause having been submitted at a former term, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed, and that respondents have and recover

of and from appellant the sum of twenty-eight and $\frac{31}{100}$ dollars costs.

Thereupon said appellant, by his counsel, prayed the allow-
14 ance of an appeal from this judgment to the Supreme Court of the United States, and asked that the amount of a bond to be given thereon be now fixed; and it is hereby ordered, counsel of respondents being present and not objecting, that said appeal be and is allowed, and the penal sum of bond to be given thereon be and is fixed at $250.00.

15 *Assignments of Error.*

JAMES M. BARLOW, Appellant,
vs.
ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLTON, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt, Appellees.

The appellant having appealed to the Supreme Court of the United States, assigns errors on the record herein as follows:

1. The court erred in affirming the judgment of the district court rendered on demurrer to the complaint, and thereby holding the complaint did not state a cause of action, and in not holding the complaint did state a cause of action, and reversing the judgment of the district court.

2. The ruling on the demurrer and the judgment of the district court thereon, and the judgment of the supreme court of Utah, necessarily affirm the complaint does not state a cause of action; whereas the complaint does state all the facts necessary to a complete cause of action.

It shows that at the time of the registration of voters in September, 1882, the plaintiff, James M. Barlow, was a qualified voter, and had the right to register as such, and to vote at the November
16 election of the same year; that his name was on the prior registration list, and should, by law, have remained there, unless removed after challenge and a hearing, as provided by law.

That he offered the proofs required by law (if any proofs were required) to have his name put on, or remain on, the registration list of his precinct.

That he was a legal voter, and had the right to vote at the November election in 1882.

That he was deprived of his lawful right to register, and also to vote, by the illegal acts of the defendants, as follows:

In erasing his name from the registration list at a time when they had no jurisdiction or lawful right to do so.

In refusing to leave his name on the registration list, or to put his name on said list, when he offered all the proofs and did all the acts required by law for that purpose.

In usurping legislative powers by prescribing a registration oath unauthorized by law, and refusing to register the plaintiff
17 unless he would subscribe and take said oath.

In requiring said plaintiff, as a requisite to registration, to subscribe and take an unauthorized oath, which gave an *ex post*

facto interpretation to a penal act, and which in its terms consisted largely of legal conclusions, and was so ambiguous as to be unintelligible.

The judgment herein having been rendered without any opinion, a more specific assignment of errors cannot be made.

F. S. RICHARDS &
C. W. BENNETT,
Counsel for Appellants.

Filed June 30, 1884.
E. T. SPRAGUE, *Clerk.*

18 The United States of America to Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt, Greeting:

You are cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, on the 2d Monday of October next, pursuant to an appeal allowed by the supreme court of the Territory of Utah on the 25th day of June, 1884, and duly entered on the records of said court, wherein James M. Barlow is appellant and you are the appellees, to show cause, if any there be, why the judgment rendered in said action by the supreme court of the Territory of Utah, on the 25th day of June, 1884, against the said appellant, should not be reversed and the errors therein corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John A. Hunter, chief justice of the supreme court of Utah Territory, this 28th day of June, A. D. 1884.

JOHN A. HUNTER,
Chief Justice.

19 A copy of the within citation was personally served on us, and the original exhibited, this 30th day of June, 1884, and due service is admitted.

DICKSON & VARIAN,
Att'ys for Appellees.

[Endorsed:] James M. Barlow *vs.* Alexander Ramsey *et al.*, appellees. Citation and admission of service. Filed June 30, 1884. E. T. Sprague, clerk.

20 Know all men by these presents, that we, Joseph E. Taylor and James P. Freeze, both of Salt Lake City, in the county of Salt Lake and Territory of Utah are held and firmly bound, jointly and severally, unto Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carlton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt, in the full and just sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carlton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we

bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this twenty-eighth day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at a term of the supreme court of the Territory of Utah, held at the city of Salt Lake, in the county of Salt
21 Lake and Territory of Utah, in a suit depending in said court on appeal from the district court of the third judicial district of said Territory, between James M. Barlow, as plaintiff and appellant, and the said Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carlton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt, as defendants and respondents, judgment was rendered against the said James M. Barlow and in favor of said respondents, in said court, at said term, and on the twenty-fifth day of June, 1884, in substance affirming the judgment of said district court, with costs, and the said James M. Barlow, having on the same day, in said supreme court of Utah Territory, prayed the allowance of an appeal to the Supreme Court of the United States, and the said appeal having been allowed, and the said court having fixed the amount of the bond to be given for damages and costs at the sum of two hundred and fifty dollars:

Now, the condition of the above obligation is such, that
22 if the said James M. Barlow shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea and appeal good, then the above obligation to be void; else to remain in full force and effect.

JOSEPH E. TAYLOR. [SEAL.]
JAMES P. FREEZE. [SEAL.]

Sealed and delivered in the presence of—
WILLIAM W. TAYLOR.
ANGUS M. CANNON.

Approved by me, this 28th day of June, A. D. 1884.
JOHN A. HUNTER,
Chief Justice Supreme Court Utah Territory.

[Endorsed:] James M. Barlow *vs.* Alexander Ramsey *et al.* Supersedeas bond. Filed June 30, 1884. E. T. Sprague, clerk.

23 No opinion has been given.

E. T. SPRAGUE, *Clerk.*

24 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of a certain appeal allowed by said court, do return hereto attached a transcript of the record and proceedings, assignment of errors, and of the bond on appeal, with a citation and proof of service thereof, all in and of said court in a certain cause in said citation described, to the Supreme Court of the United States,

and I hereby certify that said transcript of the record and proceedings, assignment of errors, and said bond, so attached, is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of said Territory, at Salt Lake City, this 1st day of July, A. D. 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 1031. James M. Barlow, appellant, *vs.* Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt. Filed October 9, 1884.

Office Supreme Court U. S.
FILED.
JAN 22 1885
JAMES H. McKENNEY.
CLERK.

114-15

Supreme Court of the United States.

OCTOBER TERM, 1884.

JESSE J. MURPHY, APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE, AND ARTHUR PRATT, APPELLEES.

No. 1027.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF AND ARGUMENT FOR APPELLANT.

GEORGE G. VEST,
WAYNE MACVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
For Appellant.

WASHINGTON.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

and I hereby certify that said transcript of the record and proceedings, assignment of errors, and said bond, so attached, is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of said Territory, at Salt Lake City, this 1st day of July, A. D. 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 1031. James M. Barlow, appellant, *vs.* Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton, J. R. Pettigrew, E. D. Hoge, and Harmel Pratt. Filed October 9, 1884.

Office Supreme Court U.S.
FILED.
JAN 22 1885
JAMES H. McKENNEY,
CLERK.

114-15

Supreme Court of the United States.

OCTOBER TERM, 1884.

JESSE J. MURPHY, APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE, AND ARTHUR PRATT, APPELLEES.

No. 1027.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF AND ARGUMENT FOR APPELLANT.

GEORGE G. VEST,
WAYNE MACVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
For Appellant.

WASHINGTON.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

October Term, 1884.

JESSE J. MURPHY,
APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE, AND ARTHUR PRATT,
APPELLEES.

No. 1027.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF FOR APPELLANT.

This case is in all respects like case No. 1028, submitted with this case, except as to some differences in the affidavit of appellant, submitted to the registration officers, and some differences in the personal standing of the appellant, which will be noticed. As to all the main questions, it is submitted on the brief and argument filed in No. 1028.

The affidavit tendered in this case is found on page 4 of the transcript, and the appellant repeats and verifies the facts which are stated in his complaint. (See transcript, pages 3 and 4.) The affidavit sets forth all that is required by the laws of Utah. It negatives any violation of the act of Con-

gress of March 22, 1882, with as much particularity and fullness of statement as would be required in drawing an indictment under that statute, and in this respect does not deal in conclusions, such as are stated in the oath prescribed by the commissioners. It goes back of the last act of Congress for the full period of three years, (the time prescribed by the statute of limitations,) and negatives the commission of any crime within that time. He also shows that, during said three years and since, he has continuously and openly resided in the Territory of Utah.

He did not negative the fact that he may have committed bigamy under the act of Congress of 1862, but his affidavit is silent on that point.

His disfranchisement must have been on one or both of these grounds: that he refused to take the prescribed oath, or that it was assumed he had committed bigamy more than three years before March 22d, 1882, and since the act of 1862.

We submit, as in case No. 1028, that no one could be required to take this unauthorized and illegal oath prescribed by the commission. If in fact he had violated the act of 1862, he could not take it, for he could not swear he was not a violator of the act of 1862, though the prosecution of the offence was barred by the statute of limitations.

The registrars had no right to assume that he had violated the act of 1862 because the affidavit on that point is silent, or to demand that a person shall take an oath either to accuse or acquit himself of an offence. Even if the presumption of guilt (which was made against all the voters of the Territory) was correct in his case, it did not affect his right to vote, for two reasons: if he had committed bigamy on the 21st day of March, 1882, the act approved the next day could not add the new punishments of section 8 of the "Edmunds act" to the past offence. And if the punishment of the offence against the act of 1862 was barred, the offence could not,

after the bar of the statute, be revived so as to subject him to a newly prescribed punishment.

GEORGE G. VEST,
WAYNE MacVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
Counsel for Appellant.

114-15

Supreme Court of the United States.

OCTOBER TERM, 1884.

MARY ANN M. PRATT, APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE, AND JOHN S. LINDSAY, APPELLEES.

No. 1028.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF AND ARGUMENT FOR APPELLANT.

GEORGE G. VEST,
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No. 1028.

Appeal from Judgment of the Supreme Court of Utah Territory.

BRIEF AND ARGUMENT FOR APPELLANT.

This action was brought by the Appellant against the Appellees, in the District Court for the Third Judicial District of Utah, to recover damages for being unlawfully deprived of the right to register and vote at the November election of the year 1882 in said Territory.

The first five named Appellees are the five persons appointed Commissioners by the President of the United States, under section 9 of the act of Congress entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States in reference to bigamy, and for other purposes," approved March 22, 1882, usually called the "Edmunds Act." The Appellee, E. D. Hoge, was the County Registrar of voters for Salt Lake County, during the registration for said November election, and the Appellee, John S.

Lindsay, was the deputy of said Hoge, in the precinct in which the Appellant lived.

The complaint filed by Plaintiff in said District Court is as follows:

"COMPLAINT.

"The plaintiff above-named complains of the defendants, and on information and belief alleges, that after the 22d day of March, 1882, and prior to the first day of July, 1882, under the provisions of Section 9 of an act of the Congress of the United States, approved March 22d, 1882, and entitled 'An act to amend Section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' the President of the United States, by and with the consent of the Senate of the United States, duly appointed the defendants, Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton, and J. R. Pettigrew, to perform the duties mentioned in said section, to be performed by a board of five persons, and by virtue of said appointment they became a board of five persons with the powers named in said section.

"And, on information and belief, the plaintiff alleges that after such appointment, and prior to the first day of August, 1882, the last-named five defendants, duly qualified as such appointees, came to Utah and organized as a board, and entered upon the exercise of the powers and the discharge of the duties granted and imposed by said Section 9 of said act of Congress. That after said organization, said five defendants were commonly called 'Commissioners,' and are hereinafter referred to and called the 'Board of Commissioners.'

"That said Board of Commissioners afterward ordered, directed, and supervised a registration of the voters of the Territory of Utah, for the general election in said Territory, to be held on the seventh day of November, 1882, for the election of a Delegate for said Territory to the Forty-eighth Congress, and for such other elections as might be held prior to another registration of voters of said Territory; and on or about the tenth day of August, 1882, the said Board of Commissioners made and published rules providing for said registration, for the appointment of Registration Officers and Judges of Election, and the canvass and return of the votes; directed said registration to be made during the week commencing on the

second Monday of September, 1882, and among other rules, wilfully and maliciously made and published the following:

"'RULE I.

"'There shall be appointed one Registration Officer for each County, and one Deputy Registration Officer for each precinct thereof.

"'RULE II.

"'Such Registration Officer shall, on the second Monday of September next, proceed by himself and his deputies in the manner following: The Registration Officer of each County shall procure from the Clerk of the County Court the last preceding registry list on file in his office, and shall, by himself or his deputies, require of each person whose name is on said list, or who applies to have his name placed on said list, to take and subscribed the following oath or affirmation:

"'TERRITORY OF UTAH, } ss:
"'*County of* ——, }

"I, —— ——, being first duly sworn, (or affirmed,) depose and say: That I am over twenty-one years of age, and have resided in the Territory of Utah for six months, and in the precinct of —— one month immediately preceding the date hereof, and (if a male) am a native-born or naturalized (as the case may be) citizen of the United States, and a taxpayer in this Territory, (or if a female) I am native-born, or naturalized, or the wife, widow, or daughter (as the case may be) of a native-born or naturalized citizen of the United States, and I do further solemnly swear (or affirm) that I am not a bigamist nor a polygamist; that I am not a violator of the laws of the United States prohibiting bigamy or polygamy; that I do not live or cohabit with more than one woman in the marriage relation, nor does any relation exist between me and any woman which has been entered into or continued in violation of the said laws of the United States prohibiting bigamy or polygamy, (and if a woman) that I am not the wife of a polygamist, nor have I entered into any relation with any man in violation of the laws of the United States concerning polygamy or bigamy.

"'Subscribed and sworn to before me this — day of ——, 1882.

"'—— ——,
"'*Registration Officer, —— Precinct.*'

"'And said Registration Officer, or his deputies, shall add to said lists the names of all qualified voters in such precinct whose names are not on the list, upon their taking and subscribing to the aforesaid oath, and the said Registration Officer shall strike from said lists the names of said persons who fail or refuse to take said oath, or have died or removed from the precinct, or are disqualified as voters under the act of Congress approved March 22d, A. D. 1882, entitled 'An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes: *Provided*, That the action of any registration officer may be revised and reversed by this Commission, upon a proper showing: *And provided, further*, That if the Registration Officer be unable to procure the registration list from the office of the Clerk of the County, or if the same have been lost or destroyed, the said officer and his deputies shall make a new registry list in full of all legal voters of each precinct of the County, under the provisions of these rules."

"That said Board of Commissioners also, by rules, provided for the appointment of and appointed three Judges of Election for each election precinct in said Territory.

"And on information and belief the Plaintiff alleges that the Defendant, E. D. Hoge, was appointed Registration Officer for the County of Salt Lake, in said Territory of Utah, and the Defendant, John S. Lindsay, was appointed Deputy Registration Officer for the third election precinct of the city of Salt Lake, in said County, and that each accepted the appointment, duly qualified, and respectively acted throughout the said registration as such Registration and Deputy Registration Officer.

"And the Plaintiff alleges that on the second Monday of September, 1882, the Defendant, John S. Lindsay, as Deputy Registration Officer for said third precinct in the city and County of Salt Lake aforesaid, acting under the direction of the other Defendants, commenced registering the voters of said precinct and making a registration list of such voters, and continued daily therein until the evening of Saturday of the same week, when the registration was closed.

"And the plaintiff alleges that she is a native citizen of the United States of America, and prior to the 22d day of March, 1882, was more than twenty-one years of age; that she has resided continuously in the Territory of Utah for more than thirty years, and resided continuously in the third precinct of Salt Lake City, in said Territory, for more than two years last

past; that she has for more than five years prior to the November election in 1882 lawfully exercised the rights and enjoyed the privileges of the election franchise in said Territory, and has, for more than five years last past, owned taxable property and been a taxpayer in said Territory, and that her name was on the last registration list of the voters of the third precinct, made prior to the second Monday of September, 1882.

"And the Plaintiff alleges that she is not and never has been a bigamist or a polygamist; that she is the widow of Orson Pratt, sr., who died prior to the 22d day of March, 1882, after a continuous residence in said Territory of more than thirty years, and that since the death of her said husband she has not cohabited with any man.

"And the Plaintiff alleges that on the 13th day of September, 1882, she personally went before the Defendant, John S. Lindsay, then acting as Deputy Registration Officer in and for the third precinct in Salt Lake City aforesaid, and signed and presented to said Defendant, and offered to verify, and requested the said Defendant to take and certify Plaintiff's oath to the following affidavit, to wit:

"TERRITORY OF UTAH, }
"*County of Salt Lake*, } *ss*:

"I, Mary Ann M. Pratt, being first duly sworn, depose and say: I am over twenty-two years of age, and have continuously resided in the Territory of Utah for more than six months, to wit, more than thirty years last past, and I have resided in the third precinct of Salt Lake City more than six months next preceding the date hereof, and still reside therein; I am a native-born citizen of the United States of America, and am the widow of Orson Pratt, sr., late deceased, who died prior to the 22d day of March, 1882, and after a continuous residence in said Territory of more than thirty years; my name is on the last registry list of voters of said precinct, and I am a taxpayer in said Territory. I am not and never have been a bigamist or polygamist, and have not on or since March 22, 1882, cohabited with any man.

"MARY ANN M. PRATT.

"Subscribed, sworn to before me, this thirteenth day of September, A. D. 1882.

"And at the same time the Plaintiff requested the said De-

fendant, John S. Lindsay, to put Plaintiff's name on the registry list of voters of said precinct, and to register her as a voter therein. That the said defendant, John S. Lindsay, acting under the directions of the other defendants, wilfully and maliciously refused to receive said affidavit or to swear Plaintiff thereto, or to register her as a voter of said precinct, but on the contrary wilfully and maliciously struck Plaintiff's name off the list of registered voters of said precinct and left her name off the list of voters of said precinct, made at said registration.

"That afterwards, before the close of said registration, and on the 14th day of September, 1882, the Plaintiff presented a duplicate of said last-named affidavit to the Defendant, E. D. Hoge, then acting as County Registration Officer for said County of Salt Lake, and informed him of the ruling and action as aforesaid of the Defendant, John S. Lindsay, and requested the Defendant, E. D. Hoge, to correct and reverse said ruling, and to instruct the Defendant, John S. Lindsay, to swear Plaintiff to said affidavit and register her as a voter, and the said Defendant, E. D. Hoge, wilfully and maliciously refused to correct or change said ruling and action, and approved and affirmed the same.

"That on the 16th day of September, 1882, the plaintiff presented to said Board of Commissioners a duplicate of said last-named affidavit, and informed them of the action and ruling of the Defendants, John S. Lindsay and E. D. Hoge, and requested said Board to reverse and correct said rulings and action, and to direct that Plaintiff's oath to said affidavit be taken, and that she be registered as a voter of said precinct, and the said Board of Commissioners wilfully and maliciously refused to correct or change said rulings, and affirmed and approved the same, and said last-named ruling was made before the close of the registration in said precinct, and when there was still time for Plaintiff to have registered before the close of the registration.

"And on information and belief the Plaintiff alleges that the Defendants all knew that unless the Plaintiff's name appeared on the registration list then being made of the voters of said precinct her vote would not be received at the election to be held November 7, 1882, or at any election until after another registration of voters.

"That at the election held throughout the Territory of Utah on the 7th of November, 1882, for the election of a

Delegate for the Territory of Utah for the Forty-eighth Congress, the Plaintiff went before the Judges of election in said third precinct of the city of Salt Lake, in the County of Salt Lake, at the place where the votes in said precinct were being taken, and offered to vote at said election, and tendered and offered to take the same affidavit, but the said Judges refused to receive her vote, on the ground that she was not registered as a voter in said precinct.

"And on information and belief the Plaintiff alleges that the Defendants, and each of them, intending to wrongfully deprive the Plaintiff of the elective franchise in said Territory, wilfully and maliciously, by the acts and in the manner aforesaid, refused the Plaintiff registration as a voter at the said registration commenced on the second Monday of September, 1882, and deprived the Plaintiff of the right to vote at the election held in said Territory on the 7th day of November, 1882, and at all elections under said registration, whereby Plaintiff has sustained damage to the amount of twelve hundred dollars.

"Wherefore the Plaintiff prays judgment against the Defendants for the sum of twelve hundred dollars and costs of suit."

To this complaint a general demurrer was sustained by the Court, and the Appellant electing to abide by the complaint, final judgment was given on the demurrer and affirmed on appeal by the Supreme Court of Utah.

It is difficult to specify errors in a case like this, further than the general statement that there was error in holding the complaint insufficient, but specifications are found on pages 8 and 9 of the transcript, as follows:

1. The Court erred in holding that the complaint did not state a cause of action.

2. In not holding that it did state a cause of action, because it shows that the Plaintiff was a legal voter, and had the right to register as such for the November election, 1882.

That her name was on the prior registration list and should have remained there unless removed on challenge, and after notice and a hearing, as provided by law.

That she offered all the proofs required by law, (if any

proofs were required,) to have her name put on, or remain on, the registration list of her precinct.

That she was a legal voter and had the right to vote at the November election, 1882.

That she was deprived of the right to register and vote by the illegal acts of the defendants, as follows:

In erasing her name from the registration list at a time when they had no jurisdiction or lawful right to do so.

In refusing to leave her name on the registration list or to put her name on said list when she offered all the proofs and did all the acts required by law for that purpose.

In usurping legislative powers by prescribing a registration oath unauthorized by law, and refusing to register the Plaintiff unless she would subscribe to and take said oath.

In requiring the plaintiff as a requisite to registration to subscribe and take an unauthorized oath, which gave an *ex post facto* interpretation to a penal act, and which in its terms consisted largely of legal conclusions, and was so ambiguous as to be unintelligible.

No opinion was filed either by the District Court or the Supreme Court of the Territory, and the points upon which the judgment below went are not in the record except as shown by the general demurrer. It will, therefore, be necessary to consider the whole case anew, and it may be here stated, as preliminary and undisputed matters, that there are two general elections in Utah for which registration lists are made—an annual election in August of each year, at which territorial, county, and precinct officers are elected, (as their terms of office expire,) and a biennial election in November, for the election of a Delegate to Congress. Special and municipal elections are provided for, but no new registration is made for these, the last revised list being used. The Appellees, when guilty of the acts complained of, were revising the registration lists for the November election, 1882, the August general election for the same year having failed because the vacated election offices were not filled in time to

hold it; the power to administer the registration oath to a voter being only given to a County Registrar and his deputies.

The five first-named Appellees have usually been called "Commissioners," or the "Utah Commission," or "Board of Commissioners," and for brevity will be referred to by one of these names.

I.

THE COMPLAINT SHOWS THAT THE PLAINTIFF WAS A LAWFUL VOTER, AND WAS ENTITLED TO REGISTER AS SUCH, AT THE REGISTRATION MADE IN SEPTEMBER, 1882.

The law of Utah as to the qualification of voters was in 1882, and still is, as follows:

"Neither shall any person be entitled to hold any office of trust or profit in the Territory, or vote at any election, unless he is a male citizen of the United States, over twenty-one years of age, and has been a constant resident in the Territory during the six months next preceding said election or appointment."

The foregoing is part of section 3 of an act approved January 21, 1859, found on page 88 of the compiled laws of Utah, 1876.

Section 6 of the same act, approved at the same time, provides that "No person shall be deemed a resident within the meaning of this act unless he is a taxpayer in this Territory."

On the same page (88) of the compiled laws is an act as follows, approved February 12, 1870:

"SECTION 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That every woman of the age of twenty-one years, who has resided in this Territory six months next preceding any general or special election, born or naturalized in the United States, or who is the wife, widow, or daughter of a native-born or naturalized citizen of the United States, shall be entitled to vote at any election in this Territory.

"SECTION 2. All laws or parts of laws conflicting with this act are hereby repealed."

This law has been acted on ever since its passage, and though its validity has been questioned several times it has been sustained by the Courts in Utah. The question was again raised on the argument of this case, and we will briefly refer to the objections which have been made to the act.

It is urged that it is in conflict with the organic act of the Territory, and the substituted provisions of the law of 1867, found in sections 1859 and 1860 of the Revised Statutes of the United States, and that the acts of Congress do not allow the Territorial Legislature to give the right of suffrage to other than "male citizens." Section 5 of the organic act of Utah, approved September 9, 1850, is not found in the present Revised Statutes of the United States, and reads as follows:

"*And be it further enacted*, That every free white male inhabitant above the age of twenty-one years, who shall have been a resident of said Territory at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory, but the qualifications of voters and of holding office at all subsequent elections shall be such as shall be prescribed by the Legislative Assembly: *Provided*, That the right of suffrage and of holding office shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the Republic of Mexico, concluded February 2d, 1848."

The changes in this enactment made in 1867 appear by sections 1859 and 1860, Revised Statutes of the United States.

It has been contended that Congress, though in words remitting the subject of the qualifications of voters to the Territorial Legislature after the first election, could not have intended, in view of the history of the country in 1850, to have authorized the enfranchisement of slaves; and that, in view of the history of the country as to the exercise of political

powers by women there is an implied restriction, both in the organic act and in the act of 1867, that those enfranchised shall be *males*.

The general Government has never passed laws prescribing the qualifications of voters in the States, but, subject to constitutional provisions, has remitted that subject to the States themselves. It has pursued the same policy with respect to all the Territories. For the purposes of organization it has provided for a first election, and then left the subject to local authority. Abundant checks upon both the power and the policy of Territorial legislatures are retained. They are not authorized to pass laws in conflict with the Constitution or their organic acts, and, if impolitic laws are passed within the powers given, they may be disapproved. The power to prescribe the qualifications of voters, after the first election, is given in the most unqualified terms. It is the "qualifications," as a whole, which "shall be such as shall be prescribed by the Legislative Assembly," and the limitations are carefully and specifically mentioned, and by implication the idea of other limitations is excluded. It cannot be said that the Women's Suffrage act exceeds the powers granted, or conflicts with any law of the United States. Congress has not deemed it impolitic, for it has been on the statute-book of Utah nearly fourteen years and was reported to Congress, but has not been disapproved.

Clinton *vs.* Englebrecht, 13 Wall., 446.

The only limitation upon the power of the Territorial legislature in prescribing the qualifications of voters after the first election is found in the words, "citizens of the United States," &c. As decided in Minor *vs.* Happersett, (21 Wall., 170,) women are citizens of the United States, and this ought to be conclusive of the question.

Section 6 of the organic act of Utah provides as follows:

"All the laws passed by the Legislative Assembly and Gov-

ernor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."

Section 1850 of the Revised Statutes of the United States also enacts that: "All laws passed by the Legislative Assembly and Governor of any Territory, except in any Territories of Colorado, Dakota, Idaho, Montana, and Wyoming, shall be submitted to Congress, and, if disapproved, shall be null and of no effect."

Whatever then may be said of any conflict between the provisions of the organic act, and the act of the Territorial legislature of Utah giving suffrage to women, it would seem that the subsequent action of Congress in approving the last-named legislation is conclusive of its validity.

The approval does not rest on acquiescence only, but in the eighth section of the Edmund's act, hereafter quoted, the existence of female suffrage in Utah is expressly recognized. Wyoming, under a similar organic act, has adopted female suffrage, and it is held valid by the courts of that Territory.

It has also been said that because males are required to be "taxpayers," and no such qualification is required of women, that the Women's Suffrage act is invalid because it destroys uniformity of qualifications and permits women to vote on easier terms than men. In the absence of any constitutional provision or law of Congress, uniformity of qualifications is not required, and citizenship does not necessarily give the right to vote.

Minor *vs.* Happersett, 21 Wall., 162–177.

When electors exercise the elective franchise under constitutional provisions, regulations for the exercise of the right must be uniform.

Cooley's Con. Lim., 602.

If there was a necessity for uniformity of qualifications the last act of the Legislature could not be void because in conflict with a prior one of the same body. The only result would be

a repeal of the "taxpayer" qualification in the former enactment, and so the Supreme Court of Utah held.

Lyman *vs.* Martin, 2 Utah, 136.

While we think this last case does not make the proper distinction between uniformity of qualifications and of regulations for the exercise of a given right to vote, yet it seems to affirm in full the validity of the act now in question.

The Legislature unnecessarily attempting to define who are citizens, used in the act the words, "wife, widow or daughter" of a citizen, and because it is possible a naturalized citizen may have a daughter over twenty-one years of age who is not a citizen, the validity of the entire act has been questioned on that ground. This objection is answered in Lyman *vs.* Martin, *supra.*

II.

THE COMMISSIONERS AND REGISTRARS, APPELLEES IN THIS CASE, ACTED ARBITRARILY, OPPRESSIVELY, AND WITHOUT AUTHORITY OF LAW IN REFUSING TO ALLOW APPELLANT TO REGISTER AND VOTE.

Section 9 of the Edmunds Act, which gave existence and authority to the Commission, reads as follows:

"SEC. 9. That all the registration and election offices of every description in the Territory of Utah are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same, and the issuing of certificates or other evidence of election in said Territory, shall, until other provisions be made by the Legislative Assembly of said Territory as is hereinafter by this section provided, be performed under the existing laws of the United States and of said Territory by proper persons, who shall be appointed to execute such offices and perform such duties by a board of five persons, to be appointed by the President, by and with the advice and consent of the Senate, not more than three of whom shall be members of one political party, and a majority of whom shall be a quorum. The mem-

bers of said board so appointed by the President shall each receive a salary at the rate of three thousand dollars per annum, and shall continue in office until the Legislative Assembly of said Territory shall make provision for filling said offices as herein authorized. The Secretary of the Territory shall be the Secretary of said Board, and keep a journal of its proceedings, and attest the action of said Board under this section. The canvass and return of all the votes at elections in said Territory for members of the Legislative Assembly thereof shall also be returned to said Board, which shall canvass all such returns and issue certificates of election to those persons who, being eligible for such election, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such Assembly: *Provided*, That said Board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy; but each house of such Assembly, after its organization, shall have power to decide upon the election and qualifications of its members. And at or after the first meeting of said Legislative Assembly whose members shall have been elected and returned according to the provisions of this act, said Legislative Assembly may make such laws, conformable to the organic act of said Territory and not inconsistent with other laws of the United States, as it shall deem proper concerning the filling of the offices in said Territory declared vacant by this act."

It is very evident that under this section the Commission had but one duty to perform prior to the election, and that was to appoint Registration and Election Officers in the places of the incumbents removed by the act. After performing this duty the Commission was *functus officio* until called upon to canvass and return the votes for members of the Legislature. Instead of performing this plain and simple duty, the Commission proceeded to constitute themselves a co-ordinate department of the Territorial Government, making rules, hearing appeals, and acting as if vested with legislative and judicial powers.

The powers and duties of the Commissioners cannot be mistaken. They were to appoint Registration and Election Officers, canvass and return the votes cast for members of the Legislative Assembly, and issue certificates of election to such persons as they might find entitled to the same.

If there could be any doubt as to this being the intention of Congress, and especially of the distinguished author of the law, the debates in the Senate at the time the bill passed that body show that the idea of the Commissioners having any such powers as they have exercised was indignantly rejected.

As reported in the Congressional Record, vol. 13, part 2, p. 1156, Mr. Edmunds said:

"As to the qualifications of electors, this Board of five persons are not by this bill vested with any powers at all; they are left exactly where they are left by the other laws of the United States."

The Commission had no authority to prescribe any oath to voters, or to change in any way the existing election laws of Utah. Nor could their appointees exercise any powers or functions except as provided by "the existing laws of the United States and said Territory."

To show how little attention was paid by the Commission or its appointees to this provision of the law, we quote very fully from the laws of the Territory as to registration and voting:

Section 37, chapter 1, title 3, compiled laws of Utah, 1876, reads: "Challenges shall be allowed at the polls for cause by any qualified voter, and the Judge of the election shall hear and immediately decide upon any challenge that may be made."

The following is part of chapter 12 of the laws of Utah, 1878:

"AN ACT *providing for the registration of voters, and to further regulate the manner of conducting elections in this Territory.*

"SEC. 1. *Be it enacted by the Governor and Legislative*

Assembly of the Territory of Utah: That the Assessors in their respective Counties are hereby constituted the Registration Officers, and they are required to appoint a resident deputy in each precinct to assist in carrying out the provisions of this act, and before the first Monday in June, 1878, in person or by deputy, they shall visit every dwelling in each precinct, and make careful inquiry as to any or all persons entitled to vote, and each Assessor or deputy, in all cases, shall ascertain upon what ground such person claims to be a voter, and he shall require each person entitled to vote and desiring to be registered to take and subscribe in substance the following oath or affirmation:

"TERRITORY OF UTAH, } *ss:*
"*County* ———, }

"I, ———, being first duly sworn, depose and say that I am over twenty-one years of age and have resided in the Territory of Utah for six months, and in the precinct of ——— one month next preceding the date hereof, and (if a male) am a ("native-born," or "naturalized," as the case may be) citizen of the United States, and a taxpayer in this Territory; (or, if a female,) I am "native-born" or "naturalized," or the "wife," "widow," or "daughter," (as the case may be,) of a native-born or naturalized citizen of the United States.

"Subscribed and sworn to before me this — day ——, A. D. 18—. ———, *Assessor.*

"Upon the receipt of such affidavit, the Assessor as aforesaid shall place the name of such voter upon the register list of the voters of the County.

"SEC. 2. It shall also be the duty of the Assessor of each County, in person or by deputy, at the time of making the annual assessment for taxes in each year, beginning in 1879, to take up the transcript of the next preceding registration list and proceed to the revision of the same, and for this purpose he shall visit every dwelling-house in each precinct, and make careful inquiry if any person whose name is on his list has died, or removed from the precinct, or is otherwise disqualified as a voter of such precinct, and if so, to erase the same therefrom, or whether any qualified voter resides therein whose name is not on his list, and if so, to add the same thereto, in the manner as provided in the preceding section.

"SEC. 3. It shall also be the duty of each Assessor, in per-

son or by deputy, during the week commencing the first Monday in June of each year, at his office, to enter on his registry list the name of any voter that may have been omitted, on such voter appearing and complying with the provision of the first section of this act required of voters for registration purposes.

"SEC. 4. Upon the completion of the list, it shall be the duty of each Assessor as aforesaid to proceed to make out a list in alphabetical order, for each precinct, containing the names of all the registered voters of such precinct, and shall, on or before the first day of July in each year, deliver all of said lists and affidavits to the Clerk of the County Court.

"SEC. 5. The Clerk of the County Court shall deliver to the Assessor the registry lists whenever necessary for the revision thereof, or adding names thereto, and the Assessor in person or by deputy shall, during the week commencing the second Monday in September in the year 1878, and every second year thereafter, enter names of voters on the registry list in the manner provided in section three of this act, and upon the list being completed, proceed as required by section four of this act: *Provided*, That in such case he shall deliver the list and affidavits on or before the 10th day of October in such year.

"SEC. 6. Voters removing from one election precinct to another in the same County may appear before the Assessor at any time previous to the delivery of the registry list to the Clerk of the County Court, and have their names erased therefrom, and they may thereupon have their names registered in the precinct to which they may remove.

"SEC 7. The Clerk of the County Court shall file and carefully preserve all said affidavits and registry lists, and shall make a copy of each precinct registry list, and cause the same to be posted up at least fifteen days before any election, at or near the place of election, and shall make and transmit another copy to the Judges of election.

"SEC. 8. The Clerk of the County Court shall cause to be printed or written a notice, which shall designate the offices to be filled, and stating that the election will commence at ——, [designating the place for holding the polls,] one hour after sunrise, and continue until sunset on the — day of ——, 18—, (naming the day of election.) Dated at ——, A. D. 18—.

"——, *Clerk of the County Court.*

"A copy of which shall be posted up at least fifteen days before the election in three public places in said precinct best

calculated to give notice to all the voters. It shall also be the duty of the Clerk of the County Court to give notice on the lists so posted that the senior Justices of the Peace for said precinct will hear objections to the right to vote of any person registered until sunset of the fifth day preceding the day of election. Said objections shall be made by a qualified voter, in writing, and delivered to the said Justice, who shall issue a written notice to the person objected to, stating the place, day, and hour when the objection will be heard. The person making the objection shall serve, or cause to be served, said notice upon the person objected to, and shall also make returns of such service to the Justice before whom the objection shall be heard. Upon the hearing of the case, if said Justice shall find that the person objected to is not a qualified voter, he shall, within three days prior to the election, transmit a certified list of the names of all such unqualified persons to the Judges of election, and said Judges shall strike such names from the registry list before the opening of the polls.

"SEC. 9. The County Court shall, at its first session in June of each year, appoint three capable and discreet persons in each precinct in the County, one at least of whom shall be of the political party that was in the minority at the last previous election, if any such party there be in such precinct, to act as Judges of general and special elections; and they shall designate one of the persons appointed to preside, and the other two to act as clerks of said elections. And the Clerk of said Court shall make out certificates of said appointments, and transmit the same by mail or other safe conveyance to the persons so appointed, who, previous to entering upon said office, shall take and subscribe an oath to the effect that they will well and faithfully perform all the duties thereof to the best of their ability, and that they will studiously endeavor to prevent any fraud, deceit, or abuse at any election over which they may preside. If, in any precinct, any of such Judges decline to serve or fail to appear, the voters of said precinct, first assembled on the day of election, to the number of six, at or immediately after the time designated for opening the polls, may elect a judge or judges to fill the vacancy, and the persons so elected shall qualify as hereinbefore provided."

Sections 10 and 11 prescribe how ballot-boxes, keys, &c., shall be procured, and provide for envelopes and ballots, and

for keeping the boxes during the voting and until the canvass, and section 12 provides how the Judges shall keep the lists, &c.

"SEC. 13. Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be filled, and when any question is to be decided in the affirmative or negative, he shall state the proposition at the bottom of the ballot, and write thereunder yes or no, as he may desire to vote thereon, which ballot shall be neatly folded and placed in one of the envelopes hereinbefore provided for, and delivered to the presiding Judge of Election, who shall, in the presence of the voter, on the name of the proposed voter being found on the registry list, and on all challenges to such vote being decided in favor of such voter, deposit it in the ballot-box, without any mark whatever being placed on such envelope; otherwise the ballot shall be rejected."

The remainder of the act relates to the canvass, returns, and certificates of election.

The foregoing provisions are the whole of the Utah laws applicable, and it will be seen that the provisions are complete and simple, and fully provide for registration for the August and November general elections.

It is also clear that but one general registration is provided for, and that all succeeding registrations are revisions of the last lists. Sections 1 and 3 provide for the *first registration* for the annual August elections. The Deputy Registrar of each precinct, to make the first list, visits every dwelling, and makes inquiry as to who claims to be a voter, and upon such person taking the oath he "shall place the name of such voter upon the registry list of the voters of the county." The reason for this mandatory provision will appear from the entire system. It is assumed that names may be omitted during this inquiry in the precinct, and it is therefore provided by section 3 that he shall give one week at his office before the list is returned to add the names of voters omitted, and then, after making out his list, he returns it to the Clerk of the County Court before

the first day of July in each year. The succeeding revisions for the annual August elections are made under sections 2 and 3. Under section 2, the Deputy Registrar, instead of making inquiry for all voters, and making a complete list, as in the first instance under section 1, takes the last revised list, and inquires only respecting changes which have occurred by death, removal, or other disqualification, or whether voters are in the precinct whose names are not on the list, and corrects his list accordingly. In order to avoid errors, he each year attends at his office one week under section 3, and the list goes annually to the Clerk, as on the first registration. This revision for the August annual election is so long before the biennial November election for Delegate that provision is made by section 5 for a revision for that election, and the Registrar attends one week at his office, and returns the list on or before October 10th in each year. Section 6 provides for removals from one precinct to another. This embraces the whole of the powers and includes all the duties of the Registering Officers.

The Clerk then posts the lists under section 7 at least fifteen days before the election, sends one copy to the Judges of Election in the precinct, and gives notice of the election under section 8. The completed list is now subject to the examination of every voter in the precinct, and challenges may be made and tried as provided in section 8. A voter may also be challenged at the polls under the provision of the compiled laws of 1876, quoted above, and which is referred to in the latter part of section 13, law of 1878, *supra*.

So far as the laws of Utah are concerned it is believed these propositions are clear.

First. *The Registrar acts ministerially, and without any authority judicial in its nature.* This appears not only from the language of the law, but also from the circumstances under which he acts, the nature of his duties, and the effect of their performance, and also the necessity of this construction, when the whole system of registration is considered. The language of the law is formal; that upon the prescribed oath being

taken, the name shall be put on the registry. There is nothing indicating any power or discretion to refuse registration on compliance with this condition. It is true he is to make careful inquiry annually, under section 2, for voters whose names are not on the prior list, but this provision is intended to give every voter the opportunity to register, and the "inquiry" is to this end, and is not an examination as to the qualifications of one claiming the right to register. The affidavit is the sole test of the qualifications, and the Registrar may not refuse to administer it. The language is, "he shall require" the oath to be taken. The same act makes it perjury to falsely take the oath, and the section reads:

"SECTION 27. If any person who is required by this act to take an oath shall falsely swear, such person shall be deemed guilty of perjury."

Sections 3 and 5 of the act also show that the Registrar acts ministerially. Under those sections he makes no inquiry, but merely awaits the appearance of the voter, administers the oath, and adds the name to the list. Under section 2 there is a limited power to erase names on personal inquiry in the precint. Some provision of this kind is necessary, when a new, full registration is never made, to free the lists from the names of non-voters, but the time, place, and manner of exercising this power are so limited as to lead to the fewest possible errors. This is the only power given to a Registrar to erase a name, and though the erasure may be made on his own inquiry, which, of course, includes the exercise of judgment, yet the power cannot be judicial or binding on the voter, or require an appeal to any tribunal, for if a voter's name is improperly erased he can appear before the same officer, under section 3, and have it restored, on taking the same affidavit required for the first registration. It is to be observed that, under sections 3 and 5, the only requirement is that the voter shall comply with section 1, that is, take the prescribed oath. The circumstances under which the Registrar acts show that his powers

are merely ministerial. He gives no notice of any hearing, has no power to call for or take any testimony, or, in short, to do anything, except to administer the oath and act on it. Nothing is left to his judgment. The necessity of leaving to the voter the right to register, independent of any discretionary power in the Registrar, is apparent from the whole system. Only registered persons can vote, (section 13;) only registered persons can be challenged under section 8, and the other challenge at the polls, under the provisions of the compiled laws of 1876, necessarily implies that the challenged party is registered, otherwise a challenge or hearing would be unnecessary. If, therefore, the Registrar may act judicially, and exclude a person from registration, the voter is remediless, and he never can get a standing to have his right to vote determined. It is incredible that the Legislature intended to put the exercise of the elective franchise in the power of Deputy Registrars of precincts. Such a construction of the law will be avoided if possible.

On the other hand, if it is held that so far as registration is concerned, the voter may judge of his own qualifications, and take the oath at his peril, the precautions against a disqualified vote are abundant. He is still subject to two challenges, and the hearings on both are *quasi* judicial.

Under section 8 careful provision is made for notice of the time and place of hearing, and the nature of this hearing clearly implies the right to take any evidence offered. The challenge under the compiled laws is at the polls, and of course in the presence of the challenged party, and the direction that the judges shall "hear and immediately decide" implies a hearing on evidence. In addition to the penalty for perjury in falsely taking the registration oath prescribed by the Utah act, the person falsely registering for or voting at the November election is punishable under sections 5511, 5512 and 5513, Revised Statutes of the United States. The purity of the elective franchise in Utah is therefore provided with sufficient safeguards without granting to Deputy Registrars the extraordinary and highly dangerous power to be its sole guardians.

SECOND. *A voter who has once registered, while his residence continues the same, need never again register.*

This proposition is clear from the language of the law. Under section 2 the Registrar only corrects the list annually. He strikes off the names of those who have removed, died, or otherwise become disqualified. It is not assumed by the law that, under this clause, the Registrar will erase the name of a legal voter; and should he do so by mistake, or on erroneous information, the voter can have it restored under section 3. When a voter has once registered the utmost diligence that can be required of him, even against a mistake of the Registrar, is to know his name is on the list on the first Monday of June. If it is then on the list, and his right to vote is disputed, he can await one of the challenges provided by law. He knows there is no other power to remove his name from the list.

THIRD. *No Registrar has the right to erase the name of a registered voter from the list of the current year after the first Monday of June.*

This is apparent from the provisions of sections 2 and 3. These sections only give the power to add names. The only exception is in cases of removal under section 6. The list, after the first Monday of June, so far as erasing names by the Registrar is concerned, must remain the same until corrected the next year under section 2. If names are afterwards taken off it must be on challenge. There is no inconvenience or impropriety in this. If, in fact, the names of a few disqualified persons, or the names of persons who have died after the first Monday of June, are on the list they can do no harm. As to living persons, there is no presumption they will offer to vote; they may be challenged under section 13, or at the polls, and the next spring the names can be removed. To allow Deputy Registrars to erase names at their will, after the first Monday of June, would put the entire vote of the Territory in their power. If during the week, beginning the first Monday of June, the Registrar or his deputy can erase names, every

voter in the precinct must attend and remain until the last minute of the week to see that his name is not erased; and, if erased, to tender the proper oath to restore it, and at the last minute of the week the Registrar or his deputy may, in his supreme judgment, conclude there are no qualified voters in the precinct, and erase the whole list. The want of power to erase names under sections 3 and 5 is entirely consistent, for no provision is made for notice to the voter nor for a hearing, and if a name is erased the voter is disfranchised without notice and without any reason being given therefor, or any opportunity afforded to be heard.

The status of the Appellant, under the laws quoted, is set forth in the affidavit she tendered to the Registration Officers, and covers with the greatest particularity every qualification required. She could not, under the law, verify this affidavit before any other officer, and when she tendered the affidavit her power to make the proof was exhausted.

The Plaintiff also showed in her proposed affidavit, and shows in her complaint, that her name was on the last registration list. This entitled her to have her name remain on the list, and was a notice to the Registrar of her claim. The Appellees, in making this registration, were proceeding under section 5 of the act of 1878, or under no law, and under the law they could not erase her name. If, however, they unlawfully erased her name, she had the right to have it restored on the affidavit tendered. The Plaintiff could not state whether her name was erased before or after she tendered the affidavit; she only knows it was on when the registration commenced and was not on when it closed, and it appears from the rule under which Appellees acted that they intended to make an entirely new list.

That the Registrars, under the law, are merely ministerial officers.

See Gillespie *vs.* Palmer, 20 Wis., 544–558.

Goetcheus *vs.* Mathewson, 61 N. Y., 420.

So far from being governed by the election and registra-

tion laws of the Territory, which we have quoted, the Commission ignored all law except the Edmunds Act, and embodied their construction of that act in the form of an oath which they required each voter to take, and upon failure the Registration Officer was directed to strike the name of such voter from the registration list.

To presume, as the rule of the Commission does, that men are guilty of a certain crime for which they ought to be deprived of their right to vote, and to provide that this presumption shall only be removed by an expurgatory oath of each individual, is to reverse those rules of evidence which lie at the foundation of all civil liberty, and which are declared by our Constitution to be unchangeable. The presumption is that all men are innocent, not that they are all guilty unless they swear away the imputation to get rid of the penalty. (See Hamilton's paper, quoted by Judge Field, 4 Wall. 330.) And no person should be compelled to become his own accuser and testify against himself, as is the case when he is commanded to take an oath like this, and is told beforehand that if he does not obey his silence will be taken as a confession of guilt and he will be punished accordingly.

But the Commission violated the Edmunds Act itself.

Section 8 of the Edmunds Act reads as follows:

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument in, under or for any such Territory or place, or under the United States."

In view of the construction placed upon this section by the Commission, it is of the first importance to ascertain the true meaning of the terms used in the law. The oath prescribed by the Commissioners and the action of the Registrars show

clearly that they construed the words "*polygamist*," "*bigamist*," or "any person *cohabiting with more than one woman*," and "*no woman cohabiting with any of the persons described as aforesaid*" to have no limitation as to time, but to include all the past life of each voter.

The words employed bear properly no such construction.

Webster in his dictionary defines a polygamist to be "a person who practices polygamy, or maintains its lawfulness."

Worcester defines the meaning as follows: "An advocate of polygamy; one who has more than one wife; one who practises polygamy."

Webster defines a bigamist to be "one who has committed bigamy, or has two wives or husbands at once."

Worcester, "one who has committed bigamy." "Much less can a bigamist have a benefice.—*Ayliffe.*

In the old English law the term *bigamist* was applied originally to clerks or ecclesiastics who married a second time, or had married a widow, while a *polygamist* was one that was married to two or more wives together.

Burrill's Law Dictionary.
2nd Ins., 273.
Cowells' Law Dictionary.
Cunningham's Law Dictionary, vol. 1.

By the modern authors *bigamy* is defined to be the crime of marrying a second time during the life of the first wife or husband, or of having more wives or husbands than one at the same time.

In Canon law the offence of marrying two wives successively, one after the death of the other, or once marrying a widow.

Polygamy is the act or state of a person, who knowing that he has two or more wives, or that she has two or more husbands, marries another.

Bouvier's Law Dictionary.
Wharton's Law Dictionary.

Abbott's Law Dictionary, vol. 1, page 140, and vol. 2, page 286.

No authority can be found, either among the lexicographers or law-writers which gives to the terms employed in section 8 the meaning claimed by the Appellees. It is unnecessary, however, to go outside of the act itself to obtain definitions. The first section defines a polygamist to be "a person who has a husband or wife living and hereafter marries another, whether married or single; or a man who hereafter simultaneously, or on the same day, marries more than one woman." And it is manifestly to this definition that section 8 of the act refers in using the term "*polygamist.*"

The terms *polygamist* and *bigamist* necessarily mean persons guilty of *polygamy* or *bigamy* after the enactment of the law and at the time they offer to vote, or of persons then having that status before the law; while the word *cohabiting* certainly does not mean *having cohabited.* Such a construction not only violates the plain meaning of the terms, but would be monstrous beyond description. It would be making the statute declare that there could be no repentance, no change of life or opinion, but that once a polygamist or bigamist, always one. Nothing but death could open a door of escape.

By referring to the oath prescribed by the Commission, it will be seen that the Appellant was required to swear that she was not "the wife of a polygamist," and that "she had not entered into any relation with any man in violation of the laws of the United States concerning polygamy or bigamy."

In other words, the Appellant was required to swear that she was not even the first or lawful wife of a polygamist, and that at no time in her life had she ever entered into the relations denounced by the law.

From what source did the Commission obtain the power to prescribe this oath?

The law of Congress declares that "no woman cohabiting with any polygamist, bigamist, or person cohabiting with more than one woman," shall be entitled to vote; and the

facts admitted by the pleadings in this case show that the Appellant was not and never had been a bigamist or polygamist, and was not cohabiting with any polygamist, bigamist, or person cohabiting with more than one woman.

We deny the right of the Commission to prescribe any oath at all, or that Appellant was obliged to take any oath other than that prescribed by the Territorial laws, but in fact the Appellant offered, in addition to the oath required by the laws of Utah, to swear that she was not a bigamist or polygamist, and had not cohabited with any man since March 22d, 1882, when the Edmunds law took effect.

The Commission required even the first and lawful wife, who had been married in one of the States of the Union, and about whose marriage no question could be made anywhere, to swear, under penalty of disfranchisement, that she was not the wife of a polygamist. Under pretense of protecting the marriage relation, the union of one man to one woman, this Commission punished the guiltless wife for the crime of the husband. The facts admitted by the pleading show that in this case the Appellant was the widow of one Orson Pratt, sr., who died before the Edmunds Act went into effect, and that she had never been a polygamist, and was therefore the first or lawful wife of her husband; but the Commission and the Courts of Utah, in the face of these facts, have branded this woman before the world with disfranchisement.

No ingenious or strained construction, no theory or invention as to a continuing *status* in polygamy or bigamy, can answer the words of the law: "*Cohabiting with any of the persons described.*" It does not say *who has cohabited*, or *who might or may have cohabited*, but *cohabiting*, and this means at the time the person offers to vote.

That acts, conduct, present status were meant by Congress as the criterion by which the Commission should be governed is evident from the proviso in section 9 of the act, which is as follows:

"*Provided*, That said board of five persons shall not exclude

any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of polygamy or bigamy; nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy."

In other words, disfranchisement was to result from acts, not mere opinions; and yet, in the face of this proviso, the Commissioners disfranchised men and women who had abandoned polygamy years before and whose acts gave the strongest and best proof of their aversion to the system.

III.

SECTION EIGHT (8) OF THE EDMUNDS ACT VIOLATES THAT PROVISION IN THE CONSTITUTION OF THE UNITED STATES WHICH PROHIBITS ANY BILL OF ATTAINDER OR EX POST FACTO LAW.

This provision of the Constitution applies to all portions of the National domain, and protects all persons, whether in a State or Territory. Congress has no more power to pass a bill of attainder or *ex post facto* law for the Territory of Utah than for the State of New York.

Section 1891 of the Revised Statutes of the United States provides that: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

See also Dred Scott *vs.* Sandford, 19 How., 449–450.

Section eight of the Edmunds law is punitory, and constitutes a bill of pains and penalties.

"The deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

"A bill of attainder is a Legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within

the meaning of the Constitution bills of attainder include bills of pains and penalties."

Cummings *vs.* State of Missouri, 4 Wall., 277–320–323.

It is claimed here, as was done in the Cummings case, that section eight of the Edmunds act only prescribes the qualifications of voters, and that it is not punitory. And, again, it is said that, even if punishment is inflicted, this fact cannot take away the right of Congress to prescribe the qualifications of voters in the Territory. We affirm that, whatever the power of Congress may be to prescribe the qualifications of voters—if, indeed, it has any such power over the Territories—it cannot, under cover of such legislation, inflict punishment upon a citizen for any offence previously committed.

So soon as the fact appears, to the satisfaction of the Court, that the object of the law is punitory, then, no matter what it may be proclaimed to be by its makers, the constitutional inhibition applies.

In State of Missouri *vs.* Kring, (107 U. S., 229,) Justice Miller said: "This Court was divided in that case, (*ex parte* Garland, 4 Wall.,) the minority being of opinion that the act in question was not a crimes act, and inflicted no punishment, in the judicial sense, for any past crime, but they did not controvert the proposition that if the act had that effect, it was an *ex post facto* law."

In both Cummings *vs.* the State of Missouri, and *ex parte* A. H. Garland, (4 Wall.,) it was urged that the oaths prescribed in the one case by the State of Missouri, and in the other by the rules of this Court, were simply qualifications for voting, holding office, and practising in this Court. Upon this ground principally was based the dissenting opinion delivered by Justice Miller in *ex parte* Garland.

And, on the other hand, it was held in these cases, by the majority of the Court, that while the oaths prescribed were ostensibly qualifications, the intention and effect were to inflict punishment in violation of the Constitution.

It is said that a man is known by the company he keeps, and if this rule should apply to legislation, the nature of section eight of the Edmunds Act is beyond question.

None but a punitory statute was ever before found with such companions. The act is as follows:

AN ACT to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fifty-three hundred and fifty-two of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows, namely:

"Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract."

"SEC. 2. That the foregoing provisions shall not affect the prosecution or punishment of any offense already committed against the section amended by the first section of this act.

"SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

"SEC. 4. That counts for any or all of the offenses named in sections one and three of this act may be joined in the same information or indictment.

"SEC. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled "An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the Legislative Assembly of the Territory of Utah;" or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge beforementioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offence named in sections one or three of this act, but if he declines to answer on any ground, he shall be rejected as incompetent.

"SEC. 6. That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation, before the passage of this act, on such conditions and under such limitations as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with.

"SEC. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue

shall have been born before the first day of January, anno Domini eighteen hundred and eighty three, are hereby legitimated.

"SEC. 8. That no polygamist, bigamist, or any person cohabitating with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or to be entitled to hold any office or place of public trust, honor or emolument, in, under, or for any such Territory or place, or under the United States.

"SEC. 9. That all the registration and election offices of every description in the Territory of Utah are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same, and the issuing of certificates or other evidence of election in said Territory, shall, until other provisions be made by the Legislative Assembly of said Territory as is hereinafter by this section provided, be performed under the existing laws of the United States and of said Territory by proper persons, who shall be appointed to execute such offices and perform such duties by a board of five persons, to be appointed by the President, by and with the advice and consent of the Senate, not more than three of whom shall be members of one political party; and a majority of whom shall be a quorum. The members of said board so appointed by the President shall each receive a salary at the rate of three thousand dollars per annum, and shall continue in office until the legislative assembly of said Territory shall make provision for filling said offices as herein authorized. The secretary of the Territory shall be the secretary of said board and keep a journal of its proceedings, and attest the action of said board under this section. The canvass and return of all the votes at elections in said Territory for members of the Legislative Assembly thereof shall also be returned to said board, which shall canvass all such returns and issue certificates of election to those persons who, being eligible for such election, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such Assembly: *Provided*, That said board of five persons shall not exclude any person otherwise eligible to

vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy; but each House of such Assembly, after its organization, shall have power to decide upon the elections and qualifications of its members; and at or after the first meeting of said Legislative Assembly, whose members shall have been elected and returned according to the provisions of this act, said Legislative Assembly may make such laws, conformable to the organic act of said Territory and not inconsistent with other laws of the United States, as it shall deem proper, concerning the filling of the offices in said Territory declared vacant by this act.

"Approved March 22, 1882."

In the first place it will be observed that the entire act is an amendment to section 5352 of chapter 3 of the Revised Statutes, the chapter relating entirely to "Crimes arising within the maritime and Territorial jurisdiction of the United States."

Section 5352 reads as follows: "Every person having a husband or wife living who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage is absent for five successive years and is not known to such person to be living, nor to any person by reason of any former marriage which has been dissolved by decree of a competent court, nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court on the ground of nullity of the marriage contract."

We confidently submit that every section and every line of the act amending this section shows by the context and the relation of the provisions to each other that it is a statute of

crimes and punishments. There can be no mistake about the spirit and animus of the whole law. It has none of the mild or persuasive features of a remedial statute, but is animated throughout by the genius of punishment.

Section 1, which defines the crime of polygamy, and section 3, which denounces cohabitation, belong to the same family with section 8, although separated by intervening sections. If, after the punishment of fine and imprisonment fixed by sections 1 and 3 for the offences of polygamy and cohabitation, we add, "nor shall be entitled to vote at any election held in such Territory," &c., as provided in section 8, the intention and effect of the law is put beyond discussion. Nor will it be permitted, under any just rule of interpretation, that section 8 shall be removed from its context and be called simply a statute of qualifications. It must be considered in connection with the other provisions of the act, and the words "polygamist" and "bigamist" in the eighth section must be referred to the first section for their definition, because they mean persons guilty as declared in the first section. Section 1 declares that "every person who *hereafter* marries another," etc., and section 3 "that if any male person *hereafter* cohabits," etc. As this act embodies all the law on these subjects the eighth section must be read as if the definitions of the first and third sections were repeated, and the word "hereafter" is implied as plainly as if written.

"In the construction of a statute every part of it must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each."

Dwarris on Statutes, 144.

In speaking of a similar statute the Supreme Court of Pennsylvania says:

"It is one of a series of acts pertaining to the same subject-matter. It must therefore be interpreted with them all in view. This is an admitted rule of statutory construction. So

long ago as Rex *vs.* Loxdale, (1 Burrows, 147,) Lord Mansfield said, when speaking of acts of Parliament, 'that all which relate to the same subject, notwithstanding some of them may be expired or not noticed, must be taken to be one system, and construed consistently." So Chancellor Kent, in the first volume of his Commentaries, 463–4, said: 'It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.'"

Huber *vs.* Reily, 3 P. F. Smith, 119.

The term polygamist means one who hereafter commits the offence defined in the law as polygamy. If one section of an act defined burglary, and another imposed some further political punishment on every "burglar," no one would question the meaning of the word "burglar" found in the same act. The words "polygamist" and "bigamist," in the eighth section, stand immediately connected with the words, "or any person cohabiting with more than one woman," and these latter words can only be referred for definition to section three, because that section first creates the offence. The same may be said respecting women cohabiting with polygamists; this is only punished by section eight, and if the term "polygamist" is to be referred to some other source than the preceding sections of the act for definition, it becomes necessary to refer associated words of the same sentence to different sources of interpretation. No part of the act purports to prescribe the qualifications of voters. It mentions no affirmative qualifications which any voter or class of voters must possess. The act is inoperative until an offence is committed, and then it acts only on the offender and punishes him or her in respect only of the offence. It has every element of a strictly criminal law and none of the elements of a civil administrative law. The section does not stop with the forfeiture of the right to vote, but forfeits the right to hold office or receive any public or fiduciary employment.

Not only does the whole act breathe the spirit of punishment, and show that it is a subterfuge to claim section eight

as an enactment for voting qualifications, but the proviso to section nine demonstrates that the idea of punishment, not qualification, governs throughout all the provisions of the law.

The debates in the Senate (Congressional Record, vol. 13, part 2, pages 1212, 1213,) show that the friends of the Edmunds act declared in the strongest terms that they did not propose to punish or molest any person on account of opinion, and therefore we find in the law the proviso to section nine forbidding the Commission to disfranchise a voter on account of his or her opinion as to polygamy or bigamy.

Now, it is evident that if the purpose of section eight was to preserve the purity of the elective franchise, by preventing it from being exercised by persons practising polygamy, the proviso to section nine would have no place in the law.

The opinions of the voter unquestionably form the material and important element in the question as to how his suffrage will be used, whether for or against the life or welfare of the State.

The same ingenuity which constructed this act as it is could just as readily have invented an oath for the voter, which would have "purged his conscience," and shown beyond question whether he was a fit person for "the right preservative of all rights."

The proviso was inserted to make good the declaration in debate, that no punishment should be inflicted for mere opinion, but that punishment ensued only when acts were done constituting the offenses of polygamy, bigamy, or cohabitation.

Not the purity of the elective franchise, but the punishment of polygamists and bigamists inspired the enactment of section eight. If intended for the purpose first named, it would have been made an amendment to section five of the organic act, which relates exclusively to the qualifications of voters in Utah. Instead of this, it is made part of a statute highly penal in every section, and *noscitur a sociis* must determine its character.

The decisions of this court have established the following propositions:

First. "The deprivation of the right to vote or hold office may be punishment, the circumstances attending, and causes of the deprivation determining that fact."

Second. A statute inflicting such punishment without legal trial and conviction is a bill of pains and penalties, prohibited by the Constitution of the United States.

If, besides, section eight be adjudged a penal enactment, and there is no escape from that conclusion, the construction put upon it by Appellees, which makes it embrace all the voter's past life and acts, constitutes it also an *ex post facto law*, in clear violation of the Constitution.

"By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; *or imposes additional punishment to that then prescribed;* or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."

Cummings *vs.* State of Missouri, 4 Wall., 277–325.
Ex parte Garland, 4 Wall., 333.
Huber *vs.* Reily, 3 P. F. Smith, 112.

"Punishments are either corporal or not corporal; punishments not corporal are fines, forfeitures, suspension, or deprivation of some political or civil right."
Bouvier's Law Dictionary.

Nor is it necessary to use the words "punish" or "punishment" in order to make a penal law.

A statute declaring that any one who crossed the lake within three miles of a certain bridge should pay toll to the bridge company, was held by Savage, C. J., to be penal.
2 Cow., 419.

Statutes creating liabilities to forfeitures are penal. (1 Paine, 32–3; 4 Mass., 473; 2 Sto., 203; 9 Shep., 541; 8 Porter, 563; 3 Hill, (S. C.,) 96; 12 N. H., 255; 1 Dana, 209–10; 4 Dev., 1.)

In the Dartmouth College Argument (5 Webster's Works, 479–81) Mr. Webster said:

"It cannot be necessary to say much in refutation of the idea that there cannot be a legal interest or ownership in anything which does not yield a pecuniary benefit, as if the law regarded no rights but rights of money and visible, tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him."

See also Ashby *vs.* White, 2 Lord Raymond, 938.

It is no answer to these propositions to say that suffrage is merely a political right. This court has already decided that "The right of suffrage when granted will be protected. He who has it can only be deprived of it by due process of law."

Minor *vs.* Happersett, 21 Wall., 176.

Nor can it be said that the adjudication of the Commissioners or Election Officers is "due process of law."

"I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offence and the imposition of legal penalties can be in any other mode than by trial according to the law of the land or due process of law—that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of elections or a board of election officers constituted under State laws is such a tribunal. I cannot think they have power to try criminal offenders, still less to adjudge the guilt or innocence of an alleged violator of the laws of the United States. A trial before such officers is not due process of law for the punishment of offences according to the meaning of that phrase in the Constitution. There are, it is true, many things which they may determine, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization. These things pertain to the ascertainment of a political right. But whether he has been guilty of a criminal offence, and has, as a consequence, forfeited his

right, is an inquiry of a different character. Neither our Constitution nor our law has conferred upon the judges of elections any such judicial functions. They are not sworn to try issues in criminal cases. They have no power to compel the attendance of witnesses, and their judgment, if rendered, would be binding upon no other tribunal."

Huber *vs.* Reily, 3 P. F. Smith, 117–118; Den *vs.* Murray, 18 How., 272; 10 Yer., 59; 5 Yer., 320; 6 Cranch, 87.

IV.

THE NINTH SECTION OF THE EDMUNDS ACT IS UNCONSTITUTIONAL.

This section gives to the five Commissioners appointed by the President the power to fill all election and registration offices in Utah, to canvass the returns for members of the Legislature, and issue certificates of election to such persons as they may determine. In other words, the entire government of the Territory is placed in the hands of these five men, without any repeal of the organic act which gives the power of local self-government to the people.

"It is conceded in the decisions of this court that Congress may secure the rights of the United States in the public domain, provide for the sale or lease of any part of it, and establish the validity of the titles of the purchasers, and may organize Territorial governments with powers of legislation.

3 How., 212; 12 How., 1; 1 Pet., 511; 13 Pet., 436; 16 How., 164.

"But the recognition of a plenary power in Congress to dispose of the public domain or to organize a Government on it, does not imply a corresponding authority to determine the internal polity, or to adjust the domestic relations, or the persons who may lawfully inhabit the Territory in which it is situated.

"A supreme power to make needful rules respecting the public domain, and a similar power of framing laws to operate upon persons and things within the Territorial limits where it lies, are distinguished by broad lines of demarcation in American history."

Dred Scott *vs.* Sandford, 19 How., 393–501.

Congress has the power to establish Governments within the Territories, or to refrain from exercising that power; and it may prescribe in the charter or enabling act that all laws enacted by the local Legislature shall be submitted to Congress for its approval, and if not approved, shall be void, but when the local Government has been established, and so long as it exists, Congress cannot legislate directly as to the internal and domestic affairs of the people of the Territory.

The law of Utah, which we have before quoted, provides for the filling of all election and registration offices, and this law was approved by Congress. The ninth section of the Edmunds act repeals the Territorial law, *pro tanto*, and substitutes the will of five Commissioners for that of the people.

Section two of article two of the Constitution provides "that Congress may by law vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments."

If the ninth section of the Edmunds act be Constitutional, Congress can vest the entire Legislative power over a Territory in Commissioners, and disregard the fundamental principle of our institutions, *local self-government*.

We deny that Congress has the power to hold the Territories of the United States as provinces, with all powers, legislative, judicial and executive, vested in Commissioners. The underlying principle of the Constitution is self-government, and Congress can make no rules or regulations which ignore this great doctrine and convert the Territories into colonies.

There is no analogy between a Territory and the District of Columbia. Congress has exclusive jurisdiction over the latter, but there is no such provision in the Constitution as to the former.

The Edmunds act, besides the punishment of fine, imprisonment, and disfranchisement for the actual offenders, seeks to curse the whole people of Utah with political slavery.

No matter what may be thought of their social or religious

opinions, as citizens of the United States, they are entitled to the protection of the Constitution, and to obtain this they appear before the tribunal of last resort.

In this temple of refuge, where the clamor of passion and prejudice cannot be heard, is their only hope.

GEORGE G. VEST,
WAYNE MacVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
Counsel for Appellant.

114-15

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1884.

MILDRED E. RANDALL AND ALFRED RANDALL,
APPELLANTS,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE, AND HARMEL PRATT,
APPELLEES.

No. 1029.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF AND ARGUMENT FOR APPELLANTS.

GEORGE G. VEST,
WAYNE MACVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
For Appellants.

WASHINGTON.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

October Term, 1884.

MILDRED E. RANDALL AND
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vs.

ALEXANDER RAMSEY, A. S. PADDOCK,
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J. R. PETTIGREW, E. D. HOGE, AND
HARMEL PRATT,
APPELLEES.

No. 1029.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF FOR APPELLANTS.

This case is submitted on the brief and argument filed in No. 1028, and all the principal questions are the same. We only note the differences in the personal standing and affidavit of the appellant, Mildred E. Randall.

Her proposed affidavit, (found on page 4 of the transcript,) after stating all the qualifications required by the Utah law, shows specificially that she has in no wise violated the act of Congress of March 22, 1882.

As section 8 of this act is the only law punishing women for unlawful cohabitation, she showed a right to vote even if she was obliged to swear to her innocence to do so.

In this case two objections have been made by counsel for appellants:

That she did not take the commissioner's oath, and that she did not show herself to be a citizen of the United States.

Enough has been said in case No. 1028 as to her obligation to take the test oath.

The claim that she did not show herself to be a citizen of the United States is that, by section 1994, a wife becomes a citizen only when she herself is of a race or class of individuals which may be naturalized, and that she did not show but that she was a Mongolian or Malay. This is an extremely fine point to be made by a Commission which has claimed that Congress has remitted to it wide discretionary powers in the control of the elective franchise in Utah, and which has exercised the supposed powers with a liberality hardly distinguishable from unlimited license.

She shows that she is the wife of a citizen, and has resided in Utah for twenty years. She personally appeared before the registrar, and gave the evidence of her personal appearance as to her race. The presumption must be in favor of the usual and ordinary, and not of the extraordinary, and her residence in any given country would be sufficient to raise the presumption that she is of the prevailing race who inhabit it, and being the wife of a citizen, she should be presumed a citizen from that fact, and until the contrary is shown. The case of Ah Yup (5th Sawyer, 155) was cited to show that a Mongolian (Chinaman) could not be naturalized. We understand the practice, at least in Eastern courts, is now to naturalize Chinese, and the races which cannot now be naturalized must be so few that in no case could there be a presumption that a person living in this country belonged to one of them.

But the answer to the point is complete on the face of the record. The appellant, to register, was not required to show that she was a voter; that could be afterwards tried, when, by registration, she had acquired a standing so that her qualifications as a voter could be tried. The legislature could and did

prescribe upon what evidence she might register, and gave the form of the affidavit. This form did not require that the wife of a citizen should show anything more respecting citizenship than the fact that she was the wife. She tendered this oath, and it may be noticed that, in this respect, the appellees' test oath is in the same form and required nothing further. She, therefore, had the right to register, and if, on challenge, it was shown that she was of a race not entitled to naturalization, she would be excluded from voting. In her complaint she avers that she is a *native citizen*, (transcript, page 3,) and the appellees having unlawfully excluded her from registration, and from an opportunity to show, on challenge, that she was a native citizen, did so at their peril, and must now abide the fact as it is.

GEORGE G. VEST,
WAYNE MacVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
Counsel for Appellants.

114-15

JAN 22 1885

Supreme Court of the United States.

OCTOBER TERM, 1884.

ELLEN C. CLAWSON AND
HIRAM B. CLAWSON,
APPELLANTS,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK,
G. L. GODFREY, A. B. CARLETON,
J. R. PETTIGREW, E. D. HOGE, AND
JAMES T. LITTLE,
APPELLEES.

No. 1030.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF AND ARGUMENT FOR APPELLANTS.

GEORGE G. VEST,
WAYNE MACVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
For Appellants.

WASHINGTON.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

October Term, 1884.

ELLEN C. CLAWSON AND
HIRAM B. CLAWSON,
APPELLANTS,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK,
G. L. GODFREY, A. B. CARLETON,
J. R. PETTIGREW, E. D. HOGE, AND
JAMES T. LITTLE,
APPELLEES.

No. 1030.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF FOR APPELLANTS.

On all the main questions in this case, it is submitted on the brief and argument filed for appellant in No. 1028.

It will be seen that the affidavit of the appellant, Ellen C. Clawson, in addition to all lawful requirements, further sets forth her status under the act of Congress of March 22d, 1882.

She could not take the test oath, for it expressly included her case.

This case requires a construction of section 8 of the act of Congress of March 22d, 1882, in this respect. We contend that the law is aimed against the unlawful cohabitation of plural wives, and that the word "unlawfully" must be im-

plied. This subject has been noticed in case No. 1028, and we only add that it could not have been the intention of Congress to punish, without any escape, the innocent lawful wife. If the act reaches her, she is visited with all its penalties if she continues to cohabit with her husband; if she would escape these penalties, she must separate from her husband and accept a legislative limited divorce, which would be the effect of the act.

GEORGE G. VEST,
WAYNE MacVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
Counsel for Appellants.

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Supreme Court of the United States.

OCTOBER TERM, 1884.

JAMES M. BARLOW, APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE, AND HARMEL PRATT, APPELLEES.

No. 1031.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF AND ARGUMENT FOR APPELLANT.

GEORGE G. VEST,
WAYNE MACVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
For Appellant.

WASHINGTON.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

October Term, 1884.

JAMES M. BARLOW,
APPELLANT,

vs.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE, AND HARMEL PRATT,
APPELLEES.

No. 1031.

Appeal from Judgment of the Supreme Court of Utah.

BRIEF FOR APPELLANT.

The proposed affidavit of the appellant, found on page 4 of the transcript, in addition to stating the requirements of the Utah law, traversed specially both of the penal acts of Congress, and showed that he had never violated either of them.

It was assumed that he was a polygamist prior to the act of 1862, and, on the theory of a continuing *status*, punished by section 8 of the act of 1882, hence he was denied registration.

This subject was sufficiently considered in case No. 1028, and this case is submitted on the argument in that case.

GEORGE G. VEST,
WAYNE MacVEAGH,
FRANKLIN S. RICHARDS,
CHARLES W. BENNETT,
Counsel for Appellant.

SUPREME COURT U.S.
FILED.
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CLERK.

114-15

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

MURPHY *v.* THE UNITED STATES.	No. 1027.
PRATT *v.* SAME.	No. 1028.
RANDALL AND HUSBAND *v.* SAME.	No. 1029.
CLAWSON AND HUSBAND *v.* SAME.	No. 1030.
BARLOW *v.* SAME.	No. 1031.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

MURPHY *v.* THE UNITED STATES.	No. 1027.
PRATT *v.* SAME.	No. 1028.
RANDALL AND HUSBAND *v.* SAME.	No. 1029.
CLAWSON AND HUSBAND *v.* SAME.	No. 1030.
BARLOW *v.* SAME.	No. 1031.

BRIEF FOR THE UNITED STATES.

These are suits against the Commissioners, &c., appointed for Utah under the "Polygamy" statute of 1882.

The complaints allege that these Commissioners, together

with their *registration* officer and a deputy of the latter, have prevented the plaintiffs from *registering*, and so from *voting*, in said Territory during the year 1882, damaging them thereby to the amount of $1,200 each.

Upon general demurrer thereto, judgment was given below in favor of the defendants, and the plaintiffs appealed.

The plaintiffs in two of these cases are men; in two others they are husbands and wives; in 1028 it is a widow.

Omitting other details in the respective complaints, it seems important here to say no more than that each of these allege that the commissioners having organized, and having appointed the other defendants to their offices, under the act of 1882, ch. 47 (see Appendix), published two *rules* on the subject of registration, the latter of which directs registration officers to require of persons proposing to vote an oath, which is given at length, [being substantially the voting oath previously required in the Territory, with additional clauses designed to enforce the provision, by the act of 1882, that bigamists, &c., should not vote]; that the plaintiff had previously been, and was then, a duly registered voter in that Territory [the special allegations thereupon will be noticed hereafter], and that in September, 1882, he went before the said deputy registration officer, and signed presented and offered to verify, &c., an oath, which is given at length, [being the same territorial oath with variously worded clauses added to meet the provisions of the act of 1882, such clauses however not conforming to those contained in the rule of the commissioners]; that the deputy refused to re-

ceive said affidavit, &c., or to register the plaintiff as a voter, but on the contrary struck his name off the list of registered voters; that afterwards he applied successively to the registration officer and commissioners, and that successively they refused to correct such ruling by the deputy; and that thereafter, in November, 1882, the election officers refused to receive his vote because of his not being registered.

There is no allegation that, or to the effect that, the defendants or any one of them required, as a preliminary to registration, that any one of these plaintiffs should take the oath by the rule prescribed. No special connection is pleaded as existing betwixt the actual refusal and the rule.

The case stated is that a certain rule was made, and that the plaintiff having done or tendered something which he believed would establish his right to register, such registration was refused, &c.

Supposing then that the plaintiff is right in contending that the election oath devised by the commissioners is illegal, no allegation has been made, and no presumption of law arises, that the defendants have enforced it against either of these plaintiffs. For the assertion that *no allegation* has been made, we refer to the complaint, which not only studiously (as it were) *omits to make that special charge*, but otherwise upon its general scope, and its statement of the deliberate and probably advised plan by which the plaintiff at the time set about to develop an issue with the deputy, &c., as to his right of suffrage, founds itself especially upon the refusal by the deputy and his superiors to

accept an oath by the efficiency of which for suffrage purposes the plaintiff is willing apparently to stand or fall. If no *allegation* as to this circumstance is to be found, it is a matter of no concern how at trial the fact might be *presumed* to be. Yet in regard to a complaint *which sets forth the evidence* upon which in case of fit allegation reliance might have been placed to establish this (viz, evidence that a *rule* to that effect had previously been adopted), it may be allowable to say that no presumption of law arises therefrom that when the affair came to *action* the rule was enforced; *i. e.*, unless it were a lawful rule. The presumption, *omnia rite acta*, or of *compliance with official regulations*, &c., arises, of course, only where such regulations are not illegal.

And per contra it is equally plain that if that rule were legal the plaintiff had no power to modify it, and thereupon to present such modification as a compliance with the statutory condition precedent to registration. In this latter respect his rights were no more than those of each of the other 20,000 voters in Utah; and obviously these had (*ab inconvenienti*) no right to require an election officer to accept of 20,000 variations of the oath as being—each of them—the lawful equivalent of that which his official superiors, in pursuance of statutory authority, had prescribed.

So far, then, as regards the substance of that complaint which has been demurred to for not stating a valid cause of action.

We proceed now to submit suggestions as to the general meaning and validity of those parts of the act of 1882 which are material to these suits:

1. *As to the meaning of the statute.*

Sections 1, 2, 3, and 4, deal with criminal offenses named therein: *Bigamy, polygamy,* and *unlawful cohabitation.*

Section 5 deals further with those offenses, and also speaks of jurors who may be affected with a bigamy, &c., that is not, and may never have been, indictable.

Section 6 provides for *amnesty* for a bigamy, &c., which may never have been crimes.

Section 7 legitimates the time of certain bigamous, &c., marriages, although there may not have been crime.

Section 8 prohibits bigamists, &c., from voting.

Section 9, in providing for election of officers, enacts that mere *opinions* upon the subject of bigamy shall not be held to exclude persons from voting.

It is contended by the learned counsel for the plaintiffs that *bigamist,* &c., in section 8, means only one who has been convicted of the crimes styled bigamy, &c., in the preceding sections.

Upon the contrary, it is now submitted that, upon first principles in our form of Government, and the consequent reason of the thing as to disabilities in voting, such disabilities are only *states existing at the time* when it is proposed to exercise the function; that such disabilities belong *prima facie* to the *political* and not the *criminal* order;

and therefore *prima facie* refer to some continuing violation of and disloyalty to social order, and not to any precedent and ended violation thereof. It is to be admitted that a constitution might found a disability in voting upon the status of being *a convict;* but that would require specific words, the more so inasmuch as upon general theory such disabilities should be only such as it is in the power of a party affected thereby to get rid of, and not indelible attaints.

If there were no other special light upon this question from the statute itself, it would be reasonable to say that the subject-matter, *Voting*, in section 8, requires that the *bigamy* which underlies the word "bigamist" in that section shall not be restrained to that sort of "bigamy" which for criminal purposes is defined in section 1. That these are sections in the same statute makes no difficulty. In contemplation of law their various topics are separated for present purposes as much as if by different volumes, or other *material butts and bounds.* Even when found in different volumes identity of subject-matter requires statutes to be construed together; and in the same way union within one statute or within one section will not prevent a court from seeing the difference in nature between diverse subject-matters, or therefore from administering these accordingly.

But the special light otherwise afforded by the *wording* of the statute is to the same effect.

The "bigamy" and "polygamy" spoken of in section 1 are *acts* which at furthest (as regards the former offense),

must have been committed within three years (Rev. Stat., sec. 1044) before the date of the passage of the statute, or (as regards the latter) must be committed thereafter. (See in general, Reynolds' case 98 U. S., 145.)

But the "bigamy" and "polygamy" mentioned in section 5 as disabilities in jurors who *practice* them are *states* which, upon the express wording of such section and the reason of the thing as well in a connection in which absence of bias is desired, may be existing, or may have ended. These may never have been cognizable as crimes, much less have been adjudged such.

So the "guilt" of the "bigamy" and "polygamy," which is to be the subject-matter of amnesty under section 6, is not *criminal* guilt, as is obvious in regard to "polygamy," ["before the passage of this act,"] and so in regard to its *sociis*. The amnesty is to rehabilitate its objects in all respects.

Again, the bigamy which affects the "bigamous" marriages mentioned in section 7 is not merely such as is criminal, for the same reason suggested in the section preceding, inasmuch as evidently the same provision as regards "polygamy" is intended to operate in favor of such polygamy as should not originate thereafter.

The preceding parts of the statute therefore allow scope for an entirely free consideration and determination of the meaning of section 8 *in the light of its subject-matter*. In that light the *bigamy* underlying the word "bigamist" is not a future *act* which shall have undergone sentence of law, nor a *past state*, which may have left its *bias* upon the mind of one needed for judicial purposes, but is a subsisting and still flagrant outrage and travesty

upon a social institution regarded all but universally as a corner-stone of the public order and liberty of this age.

To end this examination of the structure of the statute of 1882, it is submitted that the *ex abundanti* exception in section 9, to the effect that *mere opinions upon the subject of bigamy* shall not disfranchise under section 8, also shows that it is *bigamy* as *a state* which is spoken of in the latter.

Upon the whole then whether one considers the obvious general object and purpose of the statute of 1882, or sits down to something like a scrutiny of its very syllables the result is the same. Just as the law regards *marriage* as something more than a contract, *an institution*, (see Hyde *v.* Hyde, L. R., 1 P. & D., 130), so it must any form of *anti-marriage* sought to be substituted therefor: ["EVIL! *be thou my* GOOD."] Presumably therefore, a statute *entitled* as operating upon *bigamy* might be expected to include both the *act* and the *institution;* the more so when, as here, it is a statute discharging *imperial* duties, such as Congress owes in nursing and rearing *Territories* into STATES. The contents of the act of 1882, therefore, do but coincide with a previous presumption. Indeed, were it not for the strenuous manner in which learned gentlemen have pressed the point now objected to it might have been thought that our history for the last forty years had demonstrated what duties they are which Congress has attempted to meet by the act of 1882, viz, duties as to *individual misdemeanors*, and also duties as to *political misorganization:* and each of these appropriately, and in accordance with *ancient* American *ordinance*.

The opinion in the above-cited case of Hyde *v.* Hyde, L. R., 1, P. & D., 130 (quoted at large in the 7th edition of Story, Conflict &c., p. 147, n.), will be recalled by the court as containing a thoughtful disquisition upon the topic of Mormon Marriage anterior to the act of 1862; the conclusion there being that even *the first marriage* betwixt the parties to such is not *marriage* in a true sense. So wholly destructive of the ordinary institution in point of principle as well as practically is the institution now under consideration; its character in that respect, singularly enough, receiving *advantage*, according to the learned judge's reasoning, from the "bigamy" legislation of 1862, which gave a quality of validity to the first marriage which, as a Mormon institution, it did not possess.

A question remains as to the constitutionality of the statute.

Upon this topic it is submitted that it is difficult to conceive of a more perfect *discretion* (limitations *actually expressed* in the Constitution aside) than that which the language of this Court for a generation or more, and to an equal degree the practical conduct of public affairs since 1804, have in such matters attributed to Congress whilst educating Territories into States.

1. As to this Court:

I quote the principles laid down, with one consent, in the opinions of Taney, Campbell, and Curtis in the notable case of Scott *v.* Sandford, 19 Howard, 343; and in a much later opinion of this Court.

The form of government to be established necessarily rested in the discretion of Congress. * * * In some cases a government consisting of persons appointed by the Federal Government would best subserve the purposes of the Territory, where the inhabitants were few and scattered and new to one another. In other instances it would be more advisable to commit the powers of self-government to the people who had settled in the Territory, as being most competent to determine what was best for their own interests. (*Taney*, pp. 448, 449).

How much municipal power may be exercised by the people of the Territory before their admission to the Union the courts of justice cannot decide. This would depend for the most part on political considerations, which cannot enter into the determination of a case of law or equity. (*Campbell, Ib.*, pp. 514, 515.)

If, then, this clause ["rules and regulations concerning the Territory," &c.] does contain a power to legislate concerning the Territory, what are the limits of that power? To this I answer that in common with all the other legislative powers of Congress it finds limits in the express prohibition in Congress to do certain things; that in the exercise of the legislative power Congress cannot pass an *ex post facto* law or bill of attainder, and so in respect to each of the other prohibitions contained in the Constitution. Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful must be finally determined by Congress itself. Whether a law be needful is a legislative or political, not a judicial, question. Whatever Congress deems needful is so under the grant of power. (*Curtis, Ib.*, pp. 614, 615.)

> In other words [Congress] has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people under the Constitution of the United States, may do for the States. (Bank *v.* Yankton, 101 U. S., 133).

2. *As regards the legislature.*

The act which organized the Territory purchased by Mr. Jefferson from France (which was to be in force for one year) divided it, as is well known, into two parts, *the districts of Orleans* and *Louisiana*. It totally ignored rights of suffrage of any sort in either portion. As to *Orleans*, section 4 provided, "The legislative powers shall be vested in the governor and in thirteen of the most fit and discreet persons in the Territory, to be called *the legislative council*, who shall be appointed annually by the President of the United States from among those holding real estate therein." As to *Louisiana*, section 12 provided, "The governor and judges of the Indiana Territory shall have power to establish in the said district of Louisiana inferior courts, and prescribe their jurisdiction and duties, and to make all laws which they may deem conducive to the good government of the inhabitants thereof." (Act of 1804, ch. 38, 2 Stat., 283.)

By the act of March 2, 1805, the inhabitants of *Orleans* were invested with the suffrage defined in the ordinance of 1787.

The act of March 3, 1805, vested the legislative power of the *Territory of Louisiana* in the governor and three judges thereof, or a majority of them; who in turn were

appointed by the President (2 Stat., 331). This sort of legislature appears to have continued until the act of 1812 (ch. 95, 2 Stat., 743), which changed the name of the Territory to *Missouri*, and made voters of all "free white male citizens," &c.

Mr. Jefferson's correspondence exhibits him at work appointing the *Orleans* legislature, and also referring to the *Louisiana* legislature, under the act of 1804, without the smallest question of the powers of Congress or of his own thereabouts, although no doubt his mind, which recently before had been exercised with great doubts as to the power even to acquire Louisiana, and the normal condition of which was one of chronic challenge of Federal powers, had carefully scrutinized the whole matter. (*Works*, vol. 4, pp. 551, 558, and vol. 8, p. 36.)

The above legislation is a significant practical assertion of the power of Congress in the matter of Territorial suffrage, the subsequent history of its dealing therewith showing a wise exercise of such power; the rule of the ordinance of 1787 gradually taking the form afterwards presented in the organic act for Wisconsin, *i. e.*, "Free white male citizen of the United States above the age of twenty-one years * * * an inhabitant of said Territory." Stat. 1836, ch. 54, sec. 5 (5 Stat. 12).

Orleans and *Louisiana* presented cases thought to be *exceptional*, the only question *now* before the court being, What may Congress do in other cases thought to be *exceptional?*

If, for reasons good to itself, it can *suppress* suffrage for one year in Orleans and for eight in Louisiana Territory,

why not, if it should choose, also in Utah. And *a fortiori*, if it may *destroy*, why not *regulate?*

Upon the whole discussion as to the constitutionality of the act of 1882, we submit that its wording is such as wholly to avoid the difficulties presented in the cases of Cummings, 4 Wall., 277; Garland, *Ib.*, 333, and the like; as to which it has been concluded that statutory privations of right made to depend upon acts done before the enactment declaring such privations—acts, therefore, irrevocable and beyond control—are in their nature *ex post facto;* the present *right*, meantime, being one which, according to American ideas, owes its very existence to constitutions, while the statute which is supposed improperly to affect it is *organic*, and, therefore, by nature free to deal with such creations.

We do not regard the question of the right of Women to vote in Utah as sufficiently grave to require the detention of the Court with an argument thereupon. The point is respectfully submitted so far as it makes a part of what is involved upon the face of the record.

We will now say a word as to the Utah suffrage act of 1878, upon which the election machinery of the statute of 1882 was in effect engrafted.

So far as that Territorial act seems to be material here, it is submitted that it gave to the registration officers for whose appointment it provided *for that year*, power to

administer the suffrage oath therein set forth in words; and *for all succeeding years*, power to modify such oath so as to conform to suffrage qualifications as these from ime to time might be regulated by law.

In other words, to come nearer to the very form of the act, section 1 required that during that year "each assessor or deputy in all cases shall ascertain upon what ground such person claims to be a voter, and he shall require each person entitled to vote, and desiring to be registered, to take and subscribe in substance the following oath or affirmation:" [giving it]—whilst section 2 required that in each year afterward such officer should revise the registration list, and for this purpose should inquire whether any person listed has died, &c., or "is otherwise disqualified as a voter, and, if so, should erase his name;" or whether any qualified voter is not on the list, and, if so, should add his name, "in the manner as provided in the preceding section."

By section 9 of the act of 1882 these functions devolved upon the registration officer and his deputy.

It seems too evident to require argument, that when the statute of 1882 had added a new disqualification to those existing previously, no voter previously listed conld complain of the mere erasure of his name therefrom. Such former list had necessarily become *functus officio*; and as to the right of suffrage *for* 1882 created not even a presumption.

To apply the above suggestions to each of the above entitled cases:

No. 1027. *Murphy, plaintiff.*

The oath which he tendered to the deputy met the provision disqualifying bigamists by saying that *he had not, within three years before March* 22, 1882, *having a wife living, married another.*

This of course not only did not deny that he was then living in a state of bigamy which had originated anterior to those *three years* (*ex gr.* in 1878), but was even a *negative pregnant* to the effect that he was so living.

The statutory limitation upon prosecution for the criminal *act* had no bearing upon the *existing state* of disqualification for suffrage. The circumstance that the cause of disqualification may under certain conditions be also cause for criminal prosecution, cannot affect the disqualification as such. This latter gains no *advantage* over other disqualifications from its relationship to a crime! Nor is this defective allegation as regards his status aided by Murphy's statement that since March 23, 1882, he had not cohabited with more than one woman; this statement being entirely consistent with his having married A in January, 1878, and B in February; and having since March, 1882, cohabited with B only, A being retained mean time, say, as head of the family, or in some other wifely relation short of cohabitation, a relation which the Mormon institution of marriage probably admits of.

These suggestions are entirely aside from another already heretofore suggested, viz, that registration officers have a right to ask that voters shall frame their oaths, if they choose to *offer* such, simply in negative of the stat-

utory words of disqualification. This is the simple and obvious form. Other forms naturally breed suspicion, and the officer has not the time, and may not have the qualification, to distinguish equivalents from non-equivalents.

We submit therefore that in 1027 the judgment below should be affirmed.

No. 1028. *Pratt, plaintiff.*

The oath tendered was that she was a widow at the time of the passage of the act of 1882, and since, and never a bigamist or polygamist; and that since the passage of the act of 1882 she has cohabited with no man.

It seems to us that this oath substantially complies with any form of suffrage oath that was to be required in Utah in 1882, after March.

No. 1029. *Randall and husband, plaintiffs.*

The oath tendered by Mrs. Randall was that since March 22, 1882, she had not cohabited with a bigamist or polygamist, or with a man cohabiting with more than one woman; that she was not a bigamist or polygamist, or in any way a violator of the act of 1882.

This oath also seems substantially satisfactory.

No. 1030. *Clawson and husband, plaintiffs.*

Mrs. Clawson's oath was that she is the first wife of a person claimed to be a polygamist, and cohabits with him; but is not herself either a bigamist or polygamist.

She appears to be disqualified under the act.

Just as other wives receive suffrage qualification in some cases from their husband's qualification (say as native-born, &c.; see No. 1029), so the political condition of this wife is prejudiced by that of her husband. There may be nothing criminal, or it may be nothing not to be commended, in her deportment, yet she takes her husband *cum onere mariti*, so to say, as indeed many women do in many respects!

We submit that this judgment also should be affirmed.

No. 1031. *Barlow, plaintiff.*

The oath tendered here was that the proposed voter had not violated thebigamy act since its passage, *i. e.*, since July 1, 1862; nor since March 22, 1882, the *polygamy* act.

This case differs from No. 1027 only in that the *act* of bigamy in this case was not criminal when done; in No. 1027 the presumption is that it was.

Nothing is said as to the *voter's* present *status*. The industrious wording of the oath in presence of the simple requirements of the act of 1882 suggest a repetition of what is said of the *negative pregnant* exhibited in No. 1027.

We submit that this judgment also should be affirmed.

Upon the whole matter we therefore leave Nos. 1028 and 1029 to the judgment of the court upon their respective records; having expressed our own doubts thereupon; as to Nos. 1027, 1030, and 1031, we submit that there is no error.

BENJAMIN HARRIS BREWSTER,
Attorney-General.
S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

Revised Statutes, sec. 5352. Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage is absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which has been dissolved by decree of a competent court; nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court on the ground of nullity of the marriage contract. Act of July 1, 1862, ch. 126 (12 Stat., 501).

CHAP. 47.—AN ACT to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes.

Be it enacted, &c., That section fifty-three hundred and fifty-two of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows, namely:

> Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter

marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

SEC. 2. That the foregoing provisions shall not affect the prosecution or punishment of any offense already committed against the section amended by the first section of this act.

SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

SEC. 4. That counts for any or all of the offenses named in sections one and three of this act may be joined in the same information or indictment.

SEC. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United

States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled "An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah," or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense named in sections one or three of this act; but if he declines to answer on any ground, he shall be rejected as incompetent.

SEC. 6. That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation, before the passage of this act, on such conditions and under such limitations as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with.

SEC. 7. That the issue of bigamous or polygamous

marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, anno Domini eighteen hundred and eighty-three, are hereby legitimated.

SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States.

SEC. 9. That all the registration and election offices of every description in the Territory of Utah, are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same, and the issuing of certificates or other evidence of election in said Territory, shall, until other provision be made by the legislative assembly of said Territory as is hereinafter by this section provided, be performed under the existing laws of the United States and of said Territory by proper persons, who shall be appointed to execute such offices and perform such duties by a board of five persons, to be appointed by the President, by and with the advice and consent of the Senate, not more than three of whom shall be members of one political party, and a majority of whom shall be a quorum. The members of said board so appointed by the President, shall each receive a salary at the rate of three thousand dollars per annum, and shall continue in office until the legislative assembly of said Territory shall make provision for filling said offices as herein authorized. The secretary of

the Territory shall be the secretary of said board, and keep a journal of its proceedings, and attest the action of said board under this section. The canvass and return of all the votes at elections in said Territory for members of the legislative assembly thereof shall also be returned to said board, which shall canvass all such returns and issue certificates of election to those persons who, being eligible for such election, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such assembly: *Provided*, That said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy; but each house of such assembly, after its organization, shall have power to decide upon the elections and qualifications of its members. And at, or after, the first meeting of said legislative assembly whose members shall have been elected and returned according to the provisions of this act, said legislative assembly may make such laws, conformable to the organic act of said Territory and not inconsistent with other laws of the United States, as it shall deem proper concerning the filling of the offices in said Territory declared vacant by this act.

Approved, March 22, 1882.

AN ACT providing for the registration of voters, and to further regulate the manner of conducting elections in this Territory.

SEC. 1. *Be it enacted by the governor and legislative assembly of the Territory of Utah*, That the assessors in their respective counties are hereby constituted the registration officers, and they are required to appoint a resident deputy in each precinct to assist in carrying out the provisions of this act, and before the first Monday in June, 1878, in person or by deputy, they shall visit every dwell-

ing in each precinct and make careful inquiry as to any or all persons entitled to vote, and each assessor or deputy in all cases shall ascertain upon what ground such person claims to be a voter, and he shall require each person entitled to vote and desiring to be registered to take and subscribe in substance the following oath or affirmation:

TERRITORY OF UTAH,
County ———, *ss:*

I, ——— ———, being first duly sworn, depose and say that I am over twenty-one years of age and have resided in the Territory of Utah for six months and in the precinct of ——— one month next preceding the date hereof, and [if a male] am a "native born" or "naturalized" [as the case may be] citizen of the United States, and a taxpayer in this Territory, [or, if a female] I am "native born" or "naturalized," or the "wife," "widow," or "daughter" [as the case may be] of a native born or naturalized citizen of the United States.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

———,
Assessor.

Upon the receipt of such affidavit the assessor, as aforesaid, shall place the name of such voter upon the register list of the voters of the county.

SEC. 2. It shall also be the duty of the assessor of each county, in person or by deputy, at the time of making the annual assessment for taxes in each year, beginning in 1879, to take up the transcript of the next preceding registration list, and proceed to the revision of the same, and for this purpose he shall visit every dwelling-house in each precinct and make careful inquiry if any person whose name is on his list has died or removed from the precinct, or is otherwise disqualified as a voter of such precinct; and, if so, to erase the same therefrom, or whether any quali-

fied voter resides therein whose name is not on his list; and, if so, to add the same thereto in the manner as provided in the preceding section.

SEC. 3. It shall also be the duty of each assessor, in person or by deputy, during the week commencing the first Monday in June of each year, at his office, to enter on his registry list the name of any voter that may have been omitted, on such voter appearing and complying with the provision of the first section of this act required of voters for registration purposes.

SEC. 4. Upon the completion of the list, it shall be the duty of each assessor, as aforesaid, to proceed to make out a list in alphabetical order for each precinct, containing the names of all the registered voters of such precinct, and shall, on or before the first day of July in each year, deliver all of said lists and affidavits to the clerk of the county court.

SEC. 5. The clerk of the county court shall deliver to the assessor the registry lists whenever necessary for the revision thereof, or adding names thereto, and the assessor, in person or by deputy, shall, during the week commencing the second Monday in September in the year 1878, and every second year thereafter, enter names of voters on the registry list in the manner provided in section three of this act, and upon the list being completed, proceed as required by section four of this act: *Provided*, That in such case he shall deliver the list and affidavits on or before the tenth day of October in such year.

SEC. 6. Voters removing from one election precinct to another in the same county, may appear before the assessor at any time previous to the delivery of the registry list to the clerk of the county court, and have their names erased therefrom, and they may thereupon have their names registered in the precinct to which they may remove.

SEC. 7. The clerk of the county court shall file and carefully preserve all said affidavits and registry lists,

and shall make a copy of each precinct registry list, and cause the same to be posted up at least fifteen days before any election, at or near the place of election, and shall make and transmit another copy to the judges of election.

SEC. 8. The clerk of the county court shall cause to be printed or written a notice which shall designate the offices to be filled, and stating that the election will commence at ——— (designating the place for holding the polls), one hour after sunrise, and continue until sunset on the ——— day of ———, 18—. (Naming the day of election.) Dated at ———, A. D. 18–.

——— ———,
Clerk of the County Court.

A copy of which shall be posted up, at least fifteen days before the election, in three public places in said precinct, best calculated to give notice to all the voters. It shall also be the duty of the clerk of the county court to give notice on the lists so posted, that the senior justices of the peace for said precinct will hear objections to the right to vote, of any person registered until sunset of the fifth day preceding the day of election. Said objections shall be made by a qualified voter in writing and delivered to the said justice, who shall issue a written notice to the person objected to, stating the place, day, and hour when the objection will be heard. The person making the objection shall serve, or cause to be served, said notice upon the person objected to, and shall also make returns of such service to the justice before whom the objection shall be heard. Upon the hearing of the case, if said justice shall find that the person objected to is not a qualified voter, he shall, within three days prior to the election, transmit a certified list of the names of all such unqualified persons, to the judges of election, and said judges shall strike such names from the registry list before the opening of the polls.

SEC. 9. The county court shall, at its first session in June of each year, appoint three capable and discreet persons in each precinct in the county, one at least of whom shall be of the political party that was in the minority at the last previous election, if any such party there be in such precinct, to act as judges of general and special elections, and they shall designate one of the persons appointed to preside, and the other two to act as clerks of said elections. And the clerk of said courts shall make out certificates of said appointments and transmit the same by mail or other safe conveyance to the persons so appointed, who, previous to entering upon said office, shall take and subscribe an oath to the effect that they will well and faithfully perform all the duties thereof to the best of their ability, and that they will studiously endeavor to prevent any fraud, deceit, or abuse at any election over which they may preside. If in any precinct any of such judges decline to serve or fail to appear, the voters of said precinct first assembled on the day of election, to the number of six, at or immediately after the time designated for opening the polls, may elect a judge or judges to fill the vacancy and the persons so elected shall qualify as hereinbefore provided.

SEC. 10. The county court shall provide the necessary books, blanks, stationery, and ballot-boxes, which ballot-boxes shall be made of galvanized iron of suitable size, with Yale or other safe lock, and two keys, one of the keys to be kept by the judges of election and one by the clerk of the county court: *Provided*, If any county has good, substantial ballot-boxes, with Yale locks and keys, the same may be used. There shall be an opening through the lid of each ballot-box of sufficient size to admit a single ballot.

SEC. 11. The county court shall furnish the judges of elections in every precinct with a sufficient number of plain envelopes for election purposes. Said envelopes shall be uniform in color and size, without any marks, writing, printing, or device upon them; and no other kind shall

be used at any given election. Before opening the polls the ballot-box shall be carefully and publicly examined by the judges of election, who shall satisfy themselves that nothing is therein. It shall then be locked and the key thereof delivered to the presiding judge, and said ballot-box shall not be opened during the election.

SEC. 12. At the opening of the polls at all general or special elections the judges of elections, for their respective precincts, shall designate one of the judges, acting as clerk, who shall have in custody the registry of voters, and shall make the entries therein required by law; the other of said judges, acting as clerk, shall write the name of each person voting, and opposite [to] it the number of the vote.

SEC. 13. Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be filled. And when any question is to be decided, in the affirmative or negative, he shall state the proposition at the bottom of the ballot, and write thereunder "Yes" or "No," as he may desire to vote thereon; which ballot shall be neatly folded and placed in one of the envelopes hereinbefore provided for and delivered to the presiding judge of election, who shall, in the presence of the voter, on the name of the proposed voter being found on the registry list, and on all challenges to such vote being decided in favor of such voter, deposit it [in] the ballot-box, without any mark whatever being placed on such envelope; otherwise, the ballot shall be rejected.

SEC. 14. Whenever any ballot shall be deposited in the ballot-box, the judge having the registry list shall write the word "voted" opposite the name of the person casting the vote, and the other judge acting as clerk shall write the name of the voter and the number of the vote upon a list, to be made by such judge.

SEC. 15. As soon as the polls shall be closed, the judges of election shall immediately proceed to canvass the votes cast at such election, and continue without adjournment until completed. And all the candidates voted for may

be present, either in person or by representative, to witness said canvass. If any envelope contains two or more ballots of the same kind, folded together, one only shall be counted.

SEC. 16. The canvass shall commence by the judges who have acted as clerks of the election comparing their respective lists and ascertaining from said lists the number of votes cast. The box shall then be opened, and the ballots therein taken out and counted by the judges, and the judges, acting as clerks, shall each make a list of all the persons voted for. The presiding judge shall then proceed to open the ballots and call off therefrom the names of the persons voted for and the offices they are intended to fill; and the judges, acting as clerks, shall take an account of the same upon their lists; and all the ballots shall be immediately returned to the ballot-box; and the ballot-box shall be locked and securely sealed.

SEC. 17. After the canvass shall have been completed, the judges of election shall add up and determine the number of votes cast for each person, for the several offices, which result shall be placed on the lists made by the judges acting as clerks of the election, and the judges shall thereupon certify to the same, and forward all the lists, securely sealed, together with the ballot-box, to the clerk of the county court, by a qualified voter of the county, who shall, before taking the same, take and subscribe an oath to the effect that he will deliver the same to the said clerk without unnecessary delay, and that he will use his utmost ability to prevent any interference whatever therewith by any person whatsoever.

SEC. 18. On receipt of the ballot-boxes and returns of election, the clerk of the county court, in the presence of at least one member of the county court, who is not publicly known as a candidate voted for at such election, shall break the seal of the returns, and all candidates may be present as provided in section 15 of this act, and said clerk and member or members of the county court shall carefully examine the returns; and if no irregularity or

discrepancy appear therein, affecting the result of the election of any candidate, they shall accept said returns as correct; but if the right of any person voted for, for any office, is in any way affected, then the clerk and said members of the county court shall open the ballots from said precinct and canvass the same, so far as to determine the rights of the person whose office may be affected. They may also cause to appear before them any persons whom they may deem proper, and take their testimony in relation to said election in said precinct.

SEC. 19. If there shall be any disagreement in the returns, in regard to the number of votes cast for any territorial officer, or any officer whose election is affected by the votes of more counties than one, then said members of the county court shall canvass the votes, and proceed as herein directed. After the completion of the canvass, said member or members and clerk of the county court, shall declare the result thereof, and the clerk of the county court shall immediately make out and transmit a certificate of election to each person elected to any precinct or county office: *Provided*, That whenever a tie shall occur between two or more persons for the same office, the clerk of the county court shall notify each of them thereof, and the same shall be decided by lot in the presence and under the direction of the county court. The notice herein provided for shall state the time and place and the manner in which the tie is to be decided. If either of the persons notified fail to appear by self or agent, such person shall be deemed to have waived all right to the office, and the clerk shall issue the election certificate to the person appearing; if neither of them appear by self or agent, the office shall be deemed vacant, and may be filled as in case of other vacancies.

SEC. 20. Immediately after the inspection of the ballots in any ballot-box, the ballots shall be returned into the box, which shall be locked and securely sealed, and the boxes shall be so preserved for ten days after the result of the election has been declared, and immediately

after the expiration of the ten days, and no notice of a contest being filed, requiring further delay, the clerk of the county court shall, in the presence of at least one of the members of the county court and such candidates voted for as may be present, open each of the ballot-boxes and destroy all ballots contained therein.

SEC. 21. The clerk of the county court shall also, as soon as possible after the result of the election has been so determined, make out a general abstract thereof in triplicate, and certify to the correctness thereof, one of which he shall file, and one of which he shall post up in his office, and forward to the secretary of the Territory a certified copy of the names of the persons voted for and the number of votes each has received for Territorial offices. The envelope containing said abstract shall be plainly marked "Election returns from ——— County." (Filling in the name of the county as the case may be.)

SEC. 22. As soon as all the returns are received by the secretary of the Territory he shall, in the presence of the governor, unseal and canvass the same, and make an abstract thereof, and the secretary shall, within ten days thereafter, make out and transmit a certificate of election to each member of the legislature and Territorial officers elected.

SEC. 23. The assessors and their deputies shall receive such compensation for their services, required by this act, as the county court shall determine; and the judges of election shall receive for their services thirty cents per hour for all services rendered in conducting elections and canvassing votes, and each of said officers is hereby authorized to administer oaths whenever necessary to carry into effect the provisions of this act.

SEC. 24. The judges of elections shall receive for their services three dollars per day and thirty cents per hour for all services rendered in canvassing votes. All municipal elections shall be held and conducted and the returns and canvass of votes thereof made substantially in accordance with the provisions of this act, and it shall be

the duty of the city councils of their respective cities to provide for the registering of voters and the appointment or election of all officers necessary, and to furnish all necessary appliances for the carrying out of the provisions of this section; and to aid them therein the clerk of the county court, on the demand of the recorder of any municipal corporation, shall, on payment of the proper fees, furnish a certified copy of the registry list of voters of any precinct or part thereof within any such municipality.

SEC. 25. Any omission or irregularity of any assessor or other officer, pertaining to election matters, shall not invalidate any election or authorize the rejection of any legal votes cast, except to the extent that such omission or irregularity shall have prevented a fair vote.

SEC. 26. Any person who shall falsely make any return, or falsely make any certificate of election returns, or who shall in any manner procure or assist in the making of the same, or cause the same to be done, or who shall in any manner do or cause any fraud in any election, or, having entered upon any of the offices or duties provided for in this act, shall willfully fail or neglect to perform any of the duties required of such officer or person, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding the sum of one thousand dollars, or be imprisoned in the penitentiary for a term not exceeding two years.

SEC. 27. If any person who is required by this act to take an oath, shall falsely swear, such person shall be deemed guilty of perjury.

SEC. 28. Any person who shall disturb or be guilty of any riotous conduct at any election in this Territory, or who shall disturb or interfere with the canvassing of the votes, or interfere with the making of the returns, or who shall interfere with any voter in the free exercise of the elective franchise, shall be deemed guilty of a misdemeanor.

SEC. 29. Any person who shall give, or promise, or offer to give, to an elector any money, reward, or other valuable consideration for his or her vote at an election,

or for withholding the same, or who shall give, or promise to give, such considerations to any other person or party, for such elector's vote, or for the withholding thereof, or any elector who shall receive or agree to receive, for himself, or for another, any money, reward, or other valuable consideration for his vote at an election, or for withholding the same, shall be deemed guilty of a misdemeanor, and shall also forfeit the right to vote at such election; and any elector whose right to vote shall be challenged for such cause, before the election officers, shall be required to swear or affirm that the matter of the challenge is untrue before his vote shall be received.

SEC. 30. Any person who shall offer any bribe, threat, or intimidation to any elector for the purpose of influencing his or her vote, or shall examine any ballot offered or cast at the polls, or found in any ballot-box, for any other purpose than to ascertain what candidate has been elected, or who votes more than once at any one election, or knowingly offers to vote two or more ballots, or in any manner changes any ballots after the same has been deposited in the ballot-box, or adds, or attempts to add, any ballot to those legally polled, shall be deemed guilty of a misdemeanor.

SEC. 31. This act shall take effect on and after the first Monday of March, A. D. 1878.

SEC. 32. The provisions of all acts and parts of acts superseded by, or in conflict with, any of the provisions of this act, are hereby repealed.

Approved February 22, 1878.

[The debates upon the passage of the *polygamy* act of 1882 may be found in the Congressional Record for the 1st session of the 47th Congress, vol. 13, part 2: *Senate*, pp. 1152, &c., 1195, &c.; *House*, pp. 1860, &c.]